# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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No. 713

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER,

v.

WALTER KRUEGER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1956

CERTIORARI GRANTED MARCH 12, 1956

# SUPREME COURT OF THE UNITED STATES

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## INDEX

1-2 [File endorsement omitted]

In the United States District Court for the Southern District of West Virginia

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed Dec. 9, 1955

The petition of the relator WALTER KRUEGER, above-named, respectively alleges and shows to the Court as follows:

1. Relator is a citizen of the United States and a resident of the State of Texas, and brings this Petition on behalf of his daughter, DOROTHY KRUEGER SMITH.

2. The said DOROTHY KRUEGER SMITH is a citizen of the United States, and is now in custody of the respondent NINA KINSELLA, Warden of the Federal Reformatory for Women at Alderson within the territorial limits of the Southern District of West Virginia, and is unlawfully imprisoned and restrained of her liberty by respondent as said Warden, and under color of and pursuant to the sentence of a certain court-martial, in violation of her rights under the Constitution and laws of the United States, all as more particularly hereinafter recited.

3. In October 1952, the said DOROTHY KRUEGER SMITH, was living in Tokyo, Japan, in quarters furnished by the United States Government, with her minor children and her husband AUBREY D. SMITH. The said AUBREY D. SMITH was then a Colonel in the United States Army, assigned to Headquarters, Far East Command, and the said DOROTHY KRUEGER SMITH and their children had been furnished Government transportation to Japan as his dependents, and had similarly been furnished such commissary privileges and medical care as the United States Army customarily furnishes to the dependents of its personnel overseas.

4. At all times hereinafter material, the United States was at peace with Japan, the Multilateral Treaty of Peace signed September 8, 1951 (3 U. S. Treaties 3169) having become effective on April 28, 1952. At all times hereinafter material, the United States Army was in Japan, not as a military occupant by right of conquest pursuant to that branch of international law known as the law of war, but by virtue of the consent of the Japanese Government expressed in the Security Treaty between the United States and Japan (3 U. S. Treaties 3329), which Security Treaty became effective on April 28, 1952.

5. On October 4, 1952, while emotionally disturbed, and while in a condition which some psychiatrists later diagnosed as the

equivalent of legal insanity, though other psychiatrists differed, the said DOROTHY KRUEGER SMITH stabbed her said husband AUBREY D. SMITH so seriously that he died the next day in consequence of the injury so inflicted.

6. Thereafter, purporting to act under the authority of Article 2(11) of the Uniform Code of Military Justice (50 U. S. C. §552(11)), Brigadier General Onslow S. Rolfe, Army of the United States, Commanding General of the Headquarters and Service Command, a subordinate unit under the Far East Command, caused the said DOROTHY KRUEGER SMITH to be tried by a general court-martial of the United States Army convened at Toyko, Japan, on a charge of premeditated murder in violation of Article 118(1) of the Uniform Code of Military Justice (50 U. S. C. § 712(1)).

4 7. The said general court-martial was appointed by the said Brigadier General Onslow S. Rolfe, Army of the United States, pursuant to paragraph 10 of Special Orders 203, Headquarters, Headquarters and Service Command, Far East Command, dated December 16, 1952. The senior member of the said general court-martial so appointed was Major General Joseph P. Sullivan, Army of the United States.

8. The said DOROTHY KRUEGER SMITH was accordingly tried by said general court-martial on January 5 to 10th, 1953, and on January 10, 1953, was convicted of premeditated murder and sentenced to life imprisonment. The said Major General Joseph P. Sullivan, Army of the United States, served as president of the said general court-martial throughout the entire proceedings, participated in the voting on the findings and sentence, and as said president announced both findings and sentence to the accused.

9. The said findings and sentence were duly reviewed as provided in Articles 60-61, and 64-67, Uniform Code of Military Justice (50 U. S. C. §§ 647-648, 651-654). The findings and sentence were approved by the convening authority. Thereafter they were affirmed by a Board of Review in the Office of The Judge Advocate General of the Army in a decision reported at 10 CMR 350, and adhered to on reconsideration, 13 CMR 307. Finally, on December 30, 1954, the conviction was affirmed by the United States Court of Military Appeals in a decision reported at 5 USMA 314 and 17 CMR 314.

10. A Petition for New Trial filed pursuant to Article 73, Uniform Code of Military Justice (50 U. S. C. § 660) was referred to the Board of Review pursuant to paragraph 109*c* of the *Manual for Courts-Martial, U. S., 1951*, and was denied by it on May 26, 1953, in proceedings reported at 10 CMR at 369-370.

5 11. In due course, the said DOROTHY KRUEGER SMITH was returned to the United States, in custody, and now, and for

some time last past has been in the custody of the respondent KINSELLA at the Federal Reformatory for Women at Alderson within the territorial limits of the Southern District of West Virginia, under restraint imposed by the respondent under color of and pursuant to the sentence of the general court-martial proceeding hereinabove referred to.

12. The said custody, imprisonment, and restraint of the said DOROTHY KRUEGER SMITH are illegal, because the general court-martial that tried her was without jurisdiction to do so.

13. If it be assumed that Article 2(11), Uniform Code of Military Justice (50 U. S. C. § 552 (11)), *supra*, ever validly conferred jurisdiction on the United States Army to try the said DOROTHY KRUEGER SMITH as a person "accompanying the armed forces without the continental limits of the United States," then the trial was a nullity for the reason that the general court-martial had no jurisdiction because it was improperly constituted, as follows:

A court-martial is created by an appointing order issued by the convening authority. Here the convening authority was a Brigadier General, Army of the United States. He could not therefore lawfully give an order to a Major General, Army of the United States. Consequently the order purporting to convene the general court-martial that tried the said DOROTHY KRUEGER SMITH was void, and its proceedings were a nullity.

14. More fundamentally, however, Article 2(11), Uniform Code of Military Justice (50 U. S. C. § 552(11)), which purports to subject to military jurisdiction in time of peace the dependent wife of an officer of the Army who has herself no functional relationship with or to the armed forces, is unconstitutional because it violates both Article III, Section 2 of, and the Sixth Amendment to, the Constitution of the United States, which severally guarantee to the said DOROTHY KRUEGER SMITH, a civilian, the right to a trial by jury; and because the power conferred on Congress by Section 8 of Article I of the Constitution to "make Rules for the Government and Regulation of the land and naval forces" does not confer power to make rules for the government and regulation of wives of members of the land and naval forces, and does not confer power upon Congress to subject civilians to trial by court-martial in time of peace.

WHEREFORE your relator prays that a writ of habeas corpus be granted and issued, directed to NINA KINSELLA, Warden of the Federal Reformatory for Women at Alderson, West Virginia, commanding her to produce the body of the said DOROTHY KRUEGER SMITH before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of the said DOROTHY KRUEGER

SMITH, and that the said DOROTHY KRUEGER SMITH be ordered discharged from the detention and imprisonment aforesaid.

WALTER KRUEGER,
*Relator*

JOHN C. MORRISON,
*305 Morrison Building,*
*Charleston, West Virginia,*
*Attorney for the Relator.*

FREDERICK BERNAYS WIENER,
*1025 Connecticut Avenue, N. W.,*
*Washington 6, D. C.,*
ADAM RICHMOND,
*7816 Glenbrook Road,*
*Bethesda, Maryland,*
*Of Counsel.*

7 *Duly sworn to by Walter Krueger. Jurat omitted in in printing.*

8 In United States District Court

[Title omitted]

ORDER GRANTING WRIT OF HABEAS CORPUS, ETC.—December 9, 1955

This 9th day of December, 1955, came Walter Krueger (United States of America ex. rel.) by John C. Morrison, Frederick Bernays Wiener and Adam Richmond, his attorneys, and tendered and asked leave to file his Petition for Writ of Habeas Corpus herein, which Petition is ORDERED filed.

The Court, having considered the allegations of said Petition and having heard the argument of counsel thereon, it is ORDERED that a writ of habeas corpus be and the same is hereby granted and issued, directed to Nina Kinsella, Warden of the Federal Reformatory for Women, Alderson, West Virginia, commanding her to produce the body of Dorothy Krueger Smith before this Court for a hearing on said Petition at Charleston, West Virginia, on the 20th day of December, 1955, at 10:00 o'clock A.M., Eastern Standard Time.

Enter:

BEN MOORE,
*United States District Judge.*

[File endorsement omitted.]

9 In the United States District Court for the Southern District of West Virginia

[Title omitted]

WRIT OF HABEAS CORPUS—December 9, 1955

The President of the United States to Nina Kinsella, Warden, Federal Reformatory for Women, Alderson, West Virginia.

GREETING:

We command you that you have the body of Dorothy Krueger Smith, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name she shall be called or charged, before the United States District Court in and for the Southern District of West Virginia, at the Federal Court House in Charleston, West Virginia, on the 20th day of December, 1955, at 10:00 o'clock, A.M., to do and receive what shall then and there be considered concerning the said Dorothy Krueger Smith, and have you then and there this writ.

Witness, the Honorable Ben Moore, Judge of the District Court of the United States.

HOMER W. HANNA,
*Clerk of the District Court in and for the Southern District of West Virginia.*

Issued this 9th day of December, 1955.

10 In United States District Court

RETURN OF WRIT OF HABEAS CORPUS

Received this writ at Charleston, West Va., on the 9th., day of December 1955, and executed same on the 12th., day of December 1955, by serving a true copy on the within *named* Nina Kinsella warden of Federal Reformatory for Women, Alderson, West Va.

RUSSELL R. BELL,
*U. S. Marshal.*
By W. W. THOMPSON,
*Deputy.*

Expense:

| | |
|---|---|
| Mileage, 4 mi. @ 10¢ | $ .40 |
| Service, | 2.00 |
| Total | $2.40 |

Filed. Dec. 13, 1955. In Clerk's Office U. S., Dist. Court, So. Dist. W. Va., Homer W Hanna, Clerk.

11 [File endorsement omitted]

In the United States District Court For the Southern District of West Virginia

[Title omitted]

RETURN AND ANSWER—Filed December 15, 1955

Comes now the respondent, Nina Kinsella, Warden, United States Federal Reformatory for Women, Alderson, West Virginia, on whom has been served a copy of a writ of habeas corpus for the production of Dorothy Krueger Smith, and by her attorney makes return and answer to the said writ and respectfully shows to the Court that she holds the said Dorothy Krueger Smith by authority of the United States as a prisoner pursuant to the sentence of a general court-martial under the following circumstances:

I

That the said Dorothy Krueger Smith, a dependent wife accompanying the armed forces within the meaning of Article 2 (10) and (11) Uniform Code of Military Justice (50 USC 552) and therefore subject to military jurisdiction, was duly arraigned for the offense of premeditated murder in violation of the Article 118, Uniform Code of Military Justice (50 USC 712), before a general court-martial convened by Special Orders No 203, Headquarters and Service Command, Far East Command, 8232d Army Unit, APO 500, dated December 16, 1952, was convicted thereof by the court-martial, and was sentenced to life imprisonment, which
12 sentence was duly approved on February 9, 1953, by the convening authority as required by Articles 61 and 64, Uniform Code of Military Justice (50 USC 648 and 651 respectively); that upon appellate review the record of trial was held to be legally sufficient to support the findings of guilty and the sentence, and the sentence was approved and affirmed in accordance with Articles 66 and 67, Uniform Code of Military Justice (50 USC 653 and 654 respectively). An authenticated copy of the order promulgating the sentence as approved and affirmed is attached hereto (Exhibit A).

II

Answering the allegations contained in the petition for writ of habeas corpus the respondent admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that Dorothy Krueger Smith, a citizen of the United

States, is now confined pursuant to the sentence of a general court-martial in the Federal Reformatory for Women, Alderson, West Virginia, in the custody of the respondent Nina Kinsella, Warden, within the territorial limits of the Southern District of West Virginia; and denies all other allegations of paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition and alleges that these admitted facts show that Dorothy Krueger Smith was a person accompanying the armed forces within the meaning of Article 2 (10) and (11), Uniform Code of Military Justice, (50 U.S.C. 552).

4. Admits the allegations of fact contained in paragraph 4 of the petition, and alleges that all events material hereto occurred in a "time of war" as that term is used in the Uniform Code of Military Justice.

5. Admits that on October 4, 1952, Dorothy Krueger Smith stabbed her husband, Aubrey D. Smith, and inflicted such serious wounds that he died the following day; alleges that the said
13 Dorothy Krueger Smith, was found by the court-martial, the board of review, and the United States Court of Military Appeals, to have been legally sane at the time that she did with premeditation murder her husband; and denies the remaining allegations contained in paragraph 5 of the petition.

6. Admits that Brigadier General Onslow S. Rolfe, Commanding General, Headquarters Service Command, a subordinate unit under the Far East Command, caused Dorothy Krueger Smith to be tried by a general court-martial of the United States Army convened at Tokyo, Japan, on a charge of premeditated murder in violation of Article 118 Uniform Code of Military Justice (50 USC 712), pursuant to the authority of Article 2 (10) and (11) of the Uniform Code of Military Justice; alleges that the action of Brigadier General Onslow S. Rolfe was *proper and within* his authority under the provisions of the Uniform Code of Military Justice; and denies the remaining allegations contained in paragraph 6 of the petition.

7. Admits the allegations contained in paragraph 7 of the petition.

8. Admits the allegations contained in paragraph 8 of the petition.

9. Admits the allegations contained in paragraph 9 of the petition.

10. Admits the allegations contained in paragraph 10 of the petition.

11. Admits the allegations contained in paragraph 12 of the petition.

13. Admits that the officer who convened the court-martial was a

Brigadier General, Army of the United States; alleges that those members of the court-martial who were assigned to other headquarters were appointed with the concurrence of the Commander in Chief, Far East; further alleges that Dorothy Krueger Smith was a person subject to trial before a court-martial and that the court-martial which tried her was convened and constituted as required by law; and denies the remaining allegations contained in paragraph 13 of the petition.

14. Denies the allegations contained in paragraph 14 of the petition.

14 In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the Court the body of the said Dorothy Krueger Smith, and for the reasons hereinbefore set forth respectfully prays the court to discharge the said writ, dismiss the petition, and remand Dorothy Krueger Smith to the custody of the respondent.

DUNCAN W. DOUGHERTY,
*United States Attorney,*
PERCY H. BROWN,
*Assistant United States Attorney,*
LT. COL. JAMES W. BOOTH,
*Judge Advocate General's Corps,*
*United States Army,*
LT. COL. CECIL L. FORINASH,
*Judge Advocate General's Corps,*
*United States Army,*
*Counsel for Respondent.*

15 EXHIBIT "A" TO RETURN AND ANSWER

United States of America

DEPARTMENT OF THE ARMY

Washington, December 14, 1955

I HEREBY CERTIFY that the attached document pertaining to the general court-martial case of Dorothy Krueger Smith is a true and correct copy of General Court-Martial Orders No. 9, Headquarters Second Army, Fort George G. Meade, Maryland, dated 14 February 1955, which is on file in the office of The Judge Advocate General, Department of the Army, Washington 25, D. C.

EUGENE M. CAFFEY,
*Major General, USA,*
*The Judge Advocate General.*

I HEREBY CERTIFY that Major Eugene M. Caffey, who signed the foregoing certificate, is The Judge Advocate General of the Army, and as such has the legal custody of the records herein described,

and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, Wilber M. Brucker, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 14th day of December, 1955.

WILBER M. BRUCKER,
*Secretary of the Army.*

By JAMES C. COOK,
*Deputy Administrative Assistant.*

[Seal]

16-17 HEADQUARTERS SECOND ARMY

Office of the Commanding General Fort George G. Meade, Maryland

GENERAL COURT-MARTIAL
ORDER NUMBER 9

14 February 1955.

In the general court-martial case of DOROTHY K. SMITH, dependent wife of Colonel Aubrey D. Smith, deceased, U. S. Army, G-4 Section, Headquarters, Far East Command, APO 500, a person accompanying the Armed Forces without the continental limits of the United States, and without the following Territories: That part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico and the Virgin Islands, and a person subject to the Uniform Code of Military Justice under the provisions of the Administrative Agreement pursuant to Article III of the Security Treaty between the United States of America and Japan, the sentence to confinement at hard labor for the term of her natural life, as promulgated in General Court-Martial Orders No. 20, Headquarters, Headquarters and Service Command, Far East Command, APO 500, dated 9 February 1953, has been affirmed pursuant to Articles 66 and 67. The provisions of Article 71c having been complied with, the sentence will be duly executed. A United States penitentiary, reformatory or other such institution is designated as the place of confinement and the confinement will be served therein, or elsewhere as competent authority may direct. The prisoner will be committed to the custody of The Attorney General or his designated representative, and will be delivered into the custody of The Attorney General at the United States Public Health Service Hospital, Lexington, Kentucky.

BY COMMAND OF LIEUTENANT GENERAL PARKS:

HUGH P. HARRIS,
*Brigadier General, General Staff,*
*Chief of Staff.*

18 [File endorsement omitted]

In the United States District Court for the Southern District of West Virginia

[Title omitted]

RELATOR'S TRAVERSE TO RESPONDENT'S RETURN AND ANSWER—Filed December 20, 1955

Comes now WALTER KRUEGER, relator in the above-entitled cause, by his attorneys, and files this his traverse to the return and answer of respondent to the writ of habeas corpus issued herein.

Relator, for reply to the return and answer to the writ of habeas corpus, states that he hereby realleges and restates each and every averment and allegation contained and set forth in his petition with the same force and effect as though the same were set forth verbatim in this traverse.

Further replying to and answering said return, relator denies and alleges as follows:

1. Answering par. I of respondent's return and answer, relator denies that his daughter, DOROTHY KRUEGER SMITH, was, at any time material herein, accompanying the armed forces of the United States either "in time of war" or "in the field" within the meaning of Article 2(10), Uniform Code of Military Justice (50 U. S. C. § 552(10)); denies that the said DOROTHY KRUEGER SMITH was a person accompanying the armed forces of the United States within the meaning or intendment of Article 2(11), Uniform Code

19 of Military Justice (50 U. S. C. § 552(11)); and avers that neither the cited articles nor any other act of Congress could constitutionally subject the said DOROTHY KRUEGER SMITH to military jurisdiction in the admitted circumstances of this case, for the reason that no such power is granted to Congress by Article I, Section 8, Clause 14 of the Constitution, and for the further reason that any attempt to subject the said DOROTHY KRUEGER SMITH to military jurisdiction would and does violate Article III, Section 2, Paragraph 3 of, and the Sixth Amendment to, the Constitution of the United States.

2. Answering par. II(3) of respondent's answer and return, relator makes the same denials and averments contained in paragraph 1 of this traverse, immediately above, which are incorporated by reference.

3. Answering par. II(4) of respondent's answer and return, relator denies that all events material hereto ocurred in a "time of war" as used in the Uniform Code of Military Justice; and specifically denies that any of the events material hereto occurred

in a time of war in a constitutional sense so as to subject DOROTHY KRUEGER SMITH, a civilian, to military jurisdiction.

4. Answering par. II(6) of respondent's answer and return, relator makes the same denials and averments contained in paragraph one (1) of this traverse, which are incorporated by reference.

5. Answering par. II(13) of respondent's answer and return, relator makes the same denials and averments contained in paragraph 1 of this traverse, which are incorporated by reference; and relator further avers that the undisputed and undenied allegations of fact in par. 13 of the petition and in par. II-(13) of the answer and return establish as a matter of law that the general court-martial that tried the said DOROTHY KRUEGER SMITH was not legally constituted.

20-22½

WHEREFORE your relator prays that the writ of habeas corpus heretofore issued be sustained and made final and absolute, and that the said DOROTHY KRUEGER SMITH be discharged from all custody and restraint.

WALTER KRUEGER,
*Relator,*

By JOHN C. MORRISON,
*305 Morrison Building,*
*Charleston 22, W. Va.,*
*His Attorney.*

FREDERICK BERNAYS WIENER,
*1025 Connecticut Ave., N.W.,*
*Washington 6, D. C.,*
ADAM RICHMOND,
*7816 Glenbrook Road,*
*Bethesda, Maryland,*
*Of Counsel.*

23 [File endorsement omitted]

In United States District Court

UNITED STATES OF AMERICA on the relation of WALTER KRUEGER

*v.*

NINA KINSELLA, Warden of the Federal Reformatory for Women, ALDERSON, West Virginia

Habeas Corpus
No. 1726

OPINION—January 16, 1956

John C. Morrison, Esq.,
Attorney at Law,
305 Morrison Building,
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Adam Richmond, Esq.,
Attorney at Law,
7816 Glenbrook Road,
Bethesda, Maryland, For Relator.
Duncan W. Daugherty,
United States Attorney,
Percy H. Brown,
Assistant United States Attorney,
Lt. Colonel James W. Booth, JAGC,
Judge Advocate General's Corps,
United States Army,
Lt. Colonel Cecil L. Forinash, JAGC,
Judge Advocate General's Corps,
United States Army, For Respondent.
BEN MOORE,
*District Judge.*

24 OPINION

On January 10, 1953, Mrs. Dorothy Krueger Smith was convicted by a United States Army general court-martial, sitting in Tokyo, Japan, of the premeditated murder of her husband, Colonel Aubrey D. Smith. The killing occurred on the night of October 3 or early morning of October 4, 1952, at the quarters occupied by the couple within the area of the Washington Heights Housing Project.

Mrs. Smith was sentenced to imprisonment for life. She appealed through all available military channels, but her conviction and sentence were finally affirmed by the Court of Military Appeals on December 30, 1954. She is now held as a prisoner in the Federal Reformatory for Women, a United States Government Penal Institution located at Alderson, in the Southern Judicial District of West Virginia. Her father, Lieutenant General Walter Krueger, U. S. Army, retired, filed a petition with this Court on December 9, 1955, praying for a writ of habeas corpus on her behalf, and for her release from imprisonment on the ground that the court-martial lacked jurisdiction to try her.

I awarded the preliminary writ, and on December 20, 1955, Mrs. Smith was brought into court at Charleston by the respondent, Nina Kinsella, Warden of the institution where she is confined. The only evidence, aside from the allegations and admissions in the petition and return, were the certified record of the entire proceedings in the military courts and boards, both trial and appel-
25 late, and a copy of the petition recently filed in the United States District Court for the District of Columbia in the case of *Clarice B. Covert vs. Curtis Reid, Superintendent of the District of Columbia jail.* Counsel were given unlimited time to present their arguments, as well as time to file further briefs in addition to those submitted prior to the hearing.

It is pertinent to observe here that Brigadier General Onslow S. Rolfe, Commander of Headquarters and Service Command, Far East Command, detailed several officers from other commands to serve on the court-martial, among whom was Major General Joseph P. Sullivan. General Sullivan's service was with the concurrence of his commanding officer, Lieutenant General Mark Clark, Commander in Chief, Far East Command. All the other officers who were to sit on the court-martial were subordinate in rank to General Rolfe.

Mrs. Smith, who was represented at the trial and in all stages of her appeal by Brigadier General Adam Richmond, a retired officer of long legal and military experience, made no objection to the composition of the court-martial before any military court. The challenge is brought forth at this hearing for the first time.

In attacking the jurisdiction of the court-martial, petitioner advances two arguments:

1. That the court was illegally constituted, in that one of the officers who composed it was a Major General, whereas the convening officer was a Brigadier General;

26 2. That Mrs. Smith, being a civilian, was not subject to the Code of Military Justice, under the circumstances which prevailed at the time of the alleged offense and at the time of her trial.

The requirements for eligibility to sit as a member of a general court-martial are set out in Article 25 of the Uniform Code of Military Justice (50 U.S.C. 589) as follows:

> "Any officer on active duty with the armed forces shall be eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial."

There is thus no doubt that Major General Sullivan was eligible in the ordinary sense of the word, to serve as a member of a general court-martial. It is argued by counsel for petitioner that "eligibility" necessarily includes inferiority in rank to the convening officer; and that, since Brigadier General Rolfe, being subordinate in rank to Major General Sullivan, had no authority to order the latter to do anything, he could not therefore make him a member of a general court-martial.

At most, this argument turns on a mere technicality. It is not even pretended that Mrs. Smith suffered any disadvantage, or that her rights were in any way affected by the presence of Major General Sullivan as a member of the court-martial. Actually, General Sullivan was acting under the orders of his superior officer, General Mark Clark. The Manual for Courts-Martial provides for situations of this kind by the following language (see Manual for Courts-Martial, 1951, subparagraph 4 f).

27 > "Appointment of members and law officers from other commands of the same armed force.—The convening authority may, with the concurrence of their proper commander, appoint, as members of a court-martial. . . . eligible persons of the same armed force who are not otherwise under his command. Concurrence of the proper commander may be oral and need not be evidenced by the record of trial".

General Rolfe's convening of the court was an administrative, as distinguished from an operational command. In civil affairs, it would be regarded merely as an appointment, and it is so referred to in the above excerpt from the Manual for Courts-Martial. I can find nothing in the Code of Military Justice to indicate that in performing such a function distinctions of rank are important. Possibly General Sullivan might have had grounds based on seniority of rank for declining to sit on the court; possibly Mrs. Smith might have objected at the time to his sitting; but he having willingly acceded to the convening order, and she not having objected at any time to his sitting as a member of the court-martial, I hold that the objection to General Sullivan as a member of the court-martial, if there was a substantial objection, has been waived, and cannot now be raised. The applicable rule of deci-

sion is found in the case of *Swaim* v. *United States*, 165 U. S. 553, rather than in *McClaughry* v. *Deming*, 186 U.S. 49, relied on by petitioner.

Having concluded that the technical or procedural objection to the jurisdiction of the court-martial is without merit, I am forced to consider the constitutional question raised by the petitioner.

Counsel for petitioner very frankly says that the present effort to procure Mrs. Smith's release on this writ of habeas corpus
28 stems from the recent decision of the United States Supreme Court in the case of *United States of America*, ex rel., *Audrey M. Toth*, vs. *Donald A. Quarles, Secretary of the United States Air Force*, 76 Sup. Ct. 1 (1955), followed by the action of the District Court of the District of Columbia in freeing Mrs. Clarice Covert in circumstances very similar to those which surround Mrs. Smith. The *Covert* case has not yet been reported.

I think the *Toth* case is readily distinguishable. Toth was a civilian residing in the continental United States, who, at the time charges were made against him, had no connection with the armed forces. The decision in that case turned on the right of Toth to claim the protection of those Constitutional guaranties which secure to persons accused of crime in this country, except those who are in the land or naval forces, the traditional safeguards which accompany every criminal trial in the civil courts. Chief among these are the right to have the charge, if a felony, presented to a grand jury, the right to trial by jury, and to have these rights passed on by courts whose judges are a part of our Constitutional system of civil courts. Not all of these safeguards are or can be provided in a trial by court-martial.

In the *Covert* case the status of the petitioner was that of a person who, having been charged and convicted by a United States Army court-martial in a foreign land, was now within the borders of the United States, her conviction reversed, and she, no longer a follower of the army, merely awaiting trial on the original
29 charge. Judge Tamm thought that under these circumstances the principle announced in the *Toth* case obliged him to grant her freedom pursuant to the writ of habeas corpus. I do not think it necessary, because of the different circumstances in the case before me, either to adopt or reject his reasoning.

Mrs. Smith's situation differed from that of Toth in at least two significant respects:

(1) She was not living in the United States, nor present there when she was charged with the murder of her husband;

(2) She was connected with the army as a person "accompanying the armed forces without the continental limits of the United States;" both when she committed the act and when she was arrested and tried for it.

It may be useful at this point to examine the sections of Article 2 of the Code of Military Justice, "Title 50, U.S.C.A., §552," which specify the conditions under which persons accompanying the armed forces may be tried by court-martial.

The pertinent sections of Article 2 read as follows:

"The following persons are subject to this (chapter):

"_____

"(10) In time of war, all persons serving with or accompanying an armed force in the field;

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party, or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States. . . ."

It is to be observed that Article 2(10) gives unlimited court-martial jurisdiction over followers of the army in time of war and in the field. While it is not argued by counsel for petitioner that Article 2(10) in any way exceeds the Constitutional power of Congress, it is proper, I think, to point out the distinctions drawn by Congress itself between Article 2(10) and Article 2(11).

The reason for such a broad grant of court-martial jurisdiction in time of war is obvious. It is essential that the operations of an army in the field be unobstructed by the acts of any person, whatever his status. Even if the Constitution were silent on the subject, military commanders in the field of war would nevertheless have the usual and necessary court-martial powers by virtue of the law of war itself. Congress having been granted in the Constitution the powers to "declare war" and to "raise and support armies," as well as to "make rules for the government and regulation of the land and naval forces," the last mentioned power, insofar as it is to operate in time of war, is referable to the others, and is co-extensive in scope with the law of war under which court-martial jurisdiction is permitted over certain classes of civilians. *Madsen* vs. *Kinsella*, 343 U.S. 341 (1952).

Article 2(11) is not limited to a time of war or to the field of action. It purports to extend the coverage of the Code of
31 Military Justice (and hence the jurisdiction of courts-martial) to all persons "accompanying the armed forces" abroad. This coverage, however, is conditional. If some accepted rule of international law or the terms of some treaty or agreement to which the United States is a party are applicable to a particular case, then by its own limitations Article 2(11) does not come into play.

Now, it is a well recognized maxim of the law of nations that a citizen of one country who commits a local crime in another country

is amenable to the laws of the latter. In the absence of a treaty he is entitled to claim no extra-territorial rights. If he believes himself to have been unfairly dealt with, his only recourse is through diplomatic channels. From this maxim flows the principle, recognized by the Supreme Court in the case of *In Re Ross*, 140 U.S. 453 (1891), and never repudiated in any case that I have found, that the United States Constitution gives no protection to persons accused of committing local crimes in foreign countries.

Counsel for petitioner, in his brief and in argument, has cited several cases from which he argues that the doctrine that the Constitution does not "follow the flag" is outmoded, and is not now the law. *United States* v. *Flores*, 289 U.S. 137 (1933); *Blackmer* v. *United States*, 284 U.S. 421 (1932); *United States* v. *Bowman*, 260 U.S. 94 (1922); *Jones* v. *United States*, 137 U.S. 202 (1890); *Best* v. *United States*, 184 F. 2d 131 (1st Cir. 1950). On examination of these cases it is found that in every instance the crime involved was one denounced by some statute of the United States, and triable in some one of our District Courts. In no instance
32 has it been even contended that a person accused of a purely local crime in a foreign country may claim any of the procedural rights guaranteed in the Constitution of the United States.

It is plain, therefore, that the rule of *Toth* vs. *Quarles* does not apply here. Still, as I have indicated, it is not enough to find that the provisions of our Bill of Rights and other prohibitory sections of our Constitution did not stand between Mrs. Smith and her trial by court-martial. If the jurisdiction is to be sustained, we must go farther, and discover in that instrument an affirmative grant of Congressional power, either expressly or by necessary implication.

It is in evidence that in the year 1952 the newly re-organized Government of Japan entered into a treaty with the United States, which was duly ratified by the Senate. By an administrative agreement implementing that treaty, the Japanese Government ceded to the United States, through its military courts and authorities, all jurisdiction to try offenses committed in Japan by dependents of members of the armed forces, excluding those of Japanese nationality. Had this treaty been in effect at the time Article 2(11) of the Code of Military Justice was enacted, it might be cited as the source of Congressional power to pass this act; but it would scarcely be contended, I think, that a piece of legislation, if it were void for lack of constitutional authority when passed, could be validated by a later treaty, even though Congress might subsequently act freely in that field. However, the treaty
33 did remove the limitations which in its absence would have prevented Article 2(11) from taking effect, in that upon the

ratification of the treaty there was no longer any "accepted rule of international law" or any treaty to the contrary which interfered with its operation.

I am driven to the conclusion that Constitutional authority for subjecting civilians accompanying the armed forces to court-martial discipline in time of peace, if such exists, must be found in Article 1, Section 8 of the Constitution, by one of the clauses of which section the power is bestowed on Congress "to make rules for the government and regulation of the land and naval forces," as supplemented by the "necessary and proper" clause.

Courts are slow to reject as unconstitutional a law which has been duly passed by Congress. Congressmen as well as Judges take an oath to support the Constitution of the United States. It is not probable that in any session of that body there should be a dearth of members who are themselves expert in the field of Constitutional law. It is not to be lightly supposed, therefore, that Congress would enact such an important bit of legislation as that which we have under consideration without a careful inquiry into the scope of its own Constitutional power. True it is that if a law of Congress clearly transgresses some positive prohibition expressed in the Constitution it is the duty of a court to strike it down; but where, as here, the problem is merely to find authority for an act which is not forbidden by that instrument, we must proceed
34 more cautiously. In view of the "necessary and proper" clause, we must weigh in the scales in favor of the law's validity every circumstance which may be reasonably assumed to have influenced its enactment. As was said by Chief Justice Marshall in the celebrated case of *McCulloch* v. *Maryland*, 4 Wheat. 316 (U. S. 1819):

> "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . . Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

Since the end of World War II segments of the armed forces of the United States have been stationed in many nations throughout the world. In the interest of keeping the morale of the troops on a high level, the government has encouraged the wives of soldiers to accompany them and live with them at their various posts, and has expended vast sums of money in transportation and maintenance charges for that purpose. It was said in argument and not disputed that there are now no fewer than a quarter of a million civilians of all descriptions accompanying the armed forces without the continental limits of the United States and the territories mentioned in Article 2(11) of the Code of Military Justice. In the existing circumstances, if these civilians are to be exempt from discipline by the military forces in the only available way,
35 namely, by court-martial procedure, a most serious situation is presented. They must then either be subject in all respects to the local laws of the countries where they are stationed, or else they are left free from all restraints whatsoever.

Though I reject the contention of counsel for respondent that a civilian in Mrs. Smith's situation is "part" of the armed forces, nevertheless I cannot say with certainty that the power of Congress to provide for court-martial discipline of these civilians accompanying the armed forces abroad is not necessarily and properly incident to the express power "to make rules for the government and regulation of the land and naval forces." Neither the *Toth* case nor any other expression by the Supreme Court compels such a conclusion. Therefore, I must uphold Article 2(11) of the Code of Military Justice in its entirety.

The writ of habeas corpus will be discharged.

BEN MOORE,
*United States District Judge.*

January 16, 1956.

36 In the United States District Court for the Southern District of West Virginia

Habeas Corpus No. 1726

UNITED STATES OF AMERICA ON THE RELATION OF WALTER KRUEGER, RELATOR,

*v.*

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, W. VA., RESPONDENT

ORDER DISCHARGING WRIT OF HABEAS CORPUS AND REMANDING TO CUSTODY—February 2, 1956

For the reasons stated in the opinion of this Court, filed on January 16, 1956, the writ of habeas corpus heretofore issued is discharged, and it is ordered that Mrs. Dorothy Krueger Smith be

46 PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7165

UNITED STATES OF AMERICA ON THE RELATION OF WALTER KRUEGER, RELATOR, APPELLANT,

*versus*

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, RESPONDENT, APPELLEE

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston

DOCKET ENTRIES

February 21, 1956, record on appeal filed and appeal docketed.

February 23, 1956, Relator's Exhibit No. 1 and Respondent's Exhibits Nos. 1 and 2 received from the Clerk of the United States District Court for the Southern District of West Virginia, at Charleston.

47 ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPT OF RECORD IN MAKING UP RECORD FOR USE IN THE SUPREME COURT OF THE UNITED STATES ON APPLICATION FOR WRIT OF CERTIORARI

Order for Reasons Appearing to the Court, It is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

FURTHER ORDERED that a copy of this order be incorporated in said certified transcripts of records. January 9th, 1941.

JOHN J. PARKER,
*Senior Circuit Judge.*

48 Clerk's Certificate to foregoing transcript omitted in printing.

remanded to the custody of the respondent, Nina Kinsella, Warden of the Federal Reformatory for Women, at Alderson, West Virginia.

BEN MOORE,
*United States District Judge.*

Dated: February 2, 1956.

Approved as to form:

FREDERICK BERNAYS WIENER,
*Counsel for Relator.*

[File endorsement omitted.]

37-44 [File endorsement omitted]

In the United States District Court for the Southern District of West Virginia

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS—Filed February 6, 1956

Notice is hereby given that Walter Krueger (ex rel. United States of America), Relator above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order discharging the writ of habeas corpus heretofore issued in the above styled action and remanding Mrs. Dorothy Krueger Smith to the custody of the Respondent, Nina Kinsella, Warden of the Federal Reformatory for Women at Alderson, West Virginia, entered herein on February 2, 1956.

JOHN C. MORRISON,
*Attorney for Relator,*
*305 Morrison Building,*
*Charleston 24, West Virginia.*

FREDERICK BERNAYS WIENER,
*1025 Connecticut Avenue, N.W.,*
*Washington 6, D. C.*
ADAM RICHMOND,
*7816 Glenbrook Road,*
*Bethesda, Maryland,*
*Of Counsel.*

Dated February 3, 1956.

45 Clerk's Certificate to foregoing transcript omitted in printing.

49 ORDER APPOINTING COURT MARTIAL

Proceedings of a General Court-Martial which met (at) Tokyo, Japan, at 0905 hours, 5 January 1953, pursuant to the following orders:

HEADQUARTERS
HEADQUARTERS AND SERVICE COMMAND
FAR EAST COMMAND
8232D ARMY UNIT
APO 500

16 December 1952

SPECIAL ORDERS

NUMBER 203

EXTRACT

10. Pursuant to Section I, General Orders Number 51, Department of the Army, 19 May 1952, a general court-martial is hereby ordered to convene at Tokyo, Japan, at 0900 hours, on 16 December 1952, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it. (Officers not members of this command detailed with the concurrence of CINCFE, APO 500). The court will be constituted as follows:

LAW OFFICE

| | | | | |
|---|---|---|---|---|
| COL | JOHN M PITZER | 026378 | JAGC | Korean Base Section, APO 59, certified in accordance with Article 26a |
| | | MEMBERS | | |
| MAJ GEN | JOSEPH P SULLIVAN | 05328 | USA | Hq AFFE, APO 343 |
| BRIG GEN | GERSON K HEISS | 015092 | USA | Hq AFFE, APO 343 |
| COL | ALOYSIUS J LEPPING | 016853 | Arty | Hq FEC, APO 500 |
| COL | SAMUEL L METCALFE | 09684 | Inf | Hq FEC, APO 500 |
| COL | LUSTER A VICKREY | 017592 | GS | Hq FEC, APO 500 |
| COL | DAVID RADAM | 051736 | Inf | 500th MI Svc Gp APO 500 |
| LT COL | CHARLES M ACKLEY | 039997 | CE | 64th Engr Base Tops Bn APO 500 |
| LT COL | WILLIAM E FRAME | 0220711 | SigC | 71st Svc Bn APO 500 |
| LT COL | THOMAS L STEPHENS | 0278119 | CE | Japan Const Agency 7101st AU APO 500 |
| LT COL | LILLIAN HARRIS | L96 | GS | Hq AFFE, APO 343 |
| MAJ | OLIVE E MILLS | L85 | WAC | This Hq (JA Sec) |
| | | COUNSEL | | |
| LT COL | WILLIE H H JONES | 039626 | JAGC | Hq IX Corps, APO 264, Trial Counsel, certified in accordance with Article 27b |
| MAJ | EDWARD W HAUGHNEY | 061964 | JAGC | This Hq (JA Sec), Assistant Trial Counsel, certified in accordance with Article 27b |
| LT COL | HOWARD S LEVIE | 038735 | JAGC | Hq AFFE, APO 500 Defense Counsel, certified in accordance with Article 27b |

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| | | | | |
|---|---|---|---|---|
| MAJ | DUDLEY O RAE | 0366573 | Arty | This Hq (JA Sec), Assistant Defense Counsel, certified in accordance with Article 27b |

BY COMMAND OF BRIGADIER GENERAL ROLFE:
THOMAS B EVANS
Colonel, GS
Chief of Staff

OFFICIAL:

D M PRESTON
LTCOL, AGC
Asst AG

Par 10 SO 203 Hq H&S Comd FEC 8232d AU APO 500, 16 Dec 52 (Contd)

51

Department of the Army
Office of the Judge Advocate General
Washington 25, D. C.

In the Board of Review, United States Army, Before SILVERS, WOLF and CHALK, Members

CM 360857

May 26, 1953

HEADQUARTERS AND SERVICE COMMAND FAR EAST COMMAND

Sentence adjudged 10 January 1953. Approved sentence: Confinement for life.

UNITED STATES

*v.*

DOROTHY K. SMITH, dependent wife of Colonel Aubrey D. Smith, deceased, U. S. Army, G-4 Section, Headquarters Far East Command, APO 500

Appellate Counsel for the Accused: Brigadier General Adam Richmond, USA (Ret.) Lieutenant Colonel George M. Thorpe, JAGC, First Lieutenant John W. Fuhrman, JAGC.

Appellate Counsel for the United States: Colonel Allan R. Browne, JAGC, Lieutenant Colonel William R. Ward, JAGC, First Lieutenant Kenneth A. Howard, JAGC.

DECISION—May 26, 1953

The board of review has reviewed the record of trial in the above entitled case.

*Summary of Proceedings*

Upon trial by general court-martial the accused pleaded not guilty to, and was found guilty of, the premeditated murder of her husband, Colonel Aubrey D. Smith, by means of stabbing him with a knife, at Tokyo, Japan, on or about 4 October 1952, in violation of the Uniform Code of Military Justice, Article 118. She was sentenced to be confined at hard labor for life. Evidence of no previous convictions was considered. The convening authority

52 approved the sentence, directed that pending completion of appellate review the accused be transferred to Sixth Army for confinement wherever facilities are available for female prisoners, and forwarded the record of trial to The Judge Advocate General of the Army for review by a board of review.

*Statement of Facts*

About mid-September 1952, the accused and her husband, Colonel Aubrey D. Smith (the deceased), a United States Army officer, were entertaining Rick Murphy, a 17 year old friend of their son, in the living room of their officially assigned quarters in "Washington Heights," a United States Army dependent housing area in Tokyo, Japan. When Colonel Smith made a remark, "which seemed quite sarcastic," to the accused concerning "some medicine or pills or something" as she was leaving the room, the accused said to him, "'Some day I am going to kill you.'" She repeated the remark a second time. Aside from this interchange, the conversation had been "friendly" (R. 15, 18-23, 33-37; Pros Exs 1, 2).

On the morning of 3 October 1952, the accused informed Shigeko Tani, a domestic servant employed by the Smith family, that the family which included the accused, her husband, their 15 year old daughter, and 17 year old son, was to return to the United States in the near future. When the accused was driven by Mrs. Joseph S. Hardin to the dispensary, commissary and post exchange later that morning, or shortly after 0900 hours, the accused appeared happy about returning to the United States, but she also seemed "a little upset" and not too coherent in actions and speech. At the dispensary where she saw a medical officer (Captain Clifford W. Draper) and obtained paraldehyde, an obnoxious smelling sedative, she told Mrs. Hardin that she felt like killing herself but lacked the means of doing so. At the commissary, Mrs. Hardin had to assist her in walking and making purchases; and the accused became angry at a clerk over meat purchases and a man who inadvertently almost closed a door on her. Mrs. Hardin again assisted her inside her (the accused's) home upon returning there at about 1200 hours where she (the accused) soon afterwards repaired to a second floor bedroom, containing twin beds, which she shared with her husband. When Tani answered a telephone call from Colonel Smith at about 1500 hours, her attempts to awaken the accused were to no avail; however, she was awake and talked "normal" later on when Tani took her some ice water and again returned to the bedroom to wipe up a "whiskey and water" the accused had dropped on the floor. Colonel Smith arrived home at about 1730 hours, had several "drinks" before dinner, and then had dinner with his son. The accused ate no food and remained upstairs throughout the entire evening. Colonel Smith returned from a walk about 2120 hours, had a "drink," and then went upstairs. From that time until Tani retired to her bedroom, also located on the second floor, at about 2140 hours, Tani entered the Smith bedroom on one occasion to take the accused some ice water and half an orange, and on another occasion when the accused appeared "half asleep" on her bed. Neither of the

52

Smith children was home then or later (R. 38-53, 76-80, 243-259; Pros Ex 5).

Tani fell asleep at about 2200 hours. Afterwards, at some time undetermined by her, she was awakened when Colonel Smith called, "'Tani, Tani'" in a loud voice. She got up "very soon," put on her robe and slippers, and "ran" into the Smith bedroom where she found the colonel lying on his bed with blood "under [him]." The accused was at a position between the two beds. On his bed was an "Okinawa knife" with an eight inch blade which she (Tani) later concealed in the living room. The knife was one which she had located for and given to the accused on 1 October 1952 and which the accused was observed by two Japanese workmen to still be in possession of on the following day. The colonel was pale, appeared to be in pain, and had a bleeding wound on his right side in the vicinity of his lower ribs against which Tani placed a towel. He told Tani in the accused's presence that the accused had stabbed him. The accused, at various times while Tani was present thereafter, said, "'I'm so glad I did it. * * * You better go to a Japanese hospital. * * * What were you doing when I was in the hospital?'" After Tani had unsuccessfully attempted to telephone Lieutenant Colonel Joseph S. Hardin, a neighbor, for assistance, she ran to the Hardin quarters nearby and knocked on the door, again without success. Upon returning to the Smith quarters and the aforementioned bedroom, she saw the accused between the two beds with a "kitchen knife" about six inches long in her right hand pointed downward toward Colonel Smith who in turn was holding the accused's right wrist. Tani relieved the accused of the knife which was "clean" and returned it to the kitchen "which is the usual place for the knives to be kept." A second telephone call to the Hardin quarters by Tani who then handed the telephone to Colonel Smith resulted in the arrival of Colonel Hardin, his wife, and Lieutenant Colonel Melvin A. Goers (R. 53-69, 74, 80-95, 236-242; Pros Ex 4; App Ex 2).

54 Colonel Hardin testified that the second telephone call aforementioned which occurred at about five or ten minutes after midnight was answered by his wife. Previous to the said call, he had heard a knock at the door of his quarters at about 2400 hours to which he did not respond because he thought the person who knocked had departed by the time he (Colonel Hardin) got to a window overlooking the door. He had not heard the telephone ring on any other occasion about this time. When he and Colonel Goers entered the Smith bedroom, he saw Colonel Smith on his bed, observed his wound and the blood "all under him," but saw no evidence in the room of any struggle. He thought the accused was "highly intoxicated" because her actions were not coordinated, her speech was incoherent, and she did not appear rational. However, she appeared to recognize him because she called him by his first

name. He heard her say, "'It is too bad I did not get him in the heart.'" Colonel Goers, on the contrary, thought the accused was rational because she did not stagger, having only stumbled "a little or lurched" when she walked; however, she appeared "a bit dazed" and said, "'No one will ever know the reason why.'" To Colonel Goers, her remark appeared to have been "clearly spoken." Soon afterwards, she "seemed to have passed out" or was in a "deep sleep or in a deep coma" on her bed, after having attempted to light two cigarettes at the same time. Colonel Smith, before departing for the hospital, desired to put on some underwear, was assisted in doing so, and insisted on walking and did walk to the head of the stairway where a lifter was placed. When Colonel Hardin wanted to cover him with one of his (Colonel Smith's) own blankets for the ride to the hospital, Colonel Smith gave Colonel Hardin "a hard time." During the ambulance ride to the hospital, Colonel Smith was "very much interested in how long it was going to take to get [there]." Major Walter J. Burns, a military police officer, arrived at the Smith's quarters at about 0100 hours as Colonel Smith, accompanied by Colonel Hardin, departed for the hospital. The "Okinawa knife" which Tani handed Major Burns had blood on the blade and hilt which was later determined to be human blood of the same type as that of Colonel Smith. When Major Burns entered the bedroom, the accused appeared unconscious rather than asleep; and she did not awaken when he carried her to an ambulance which arrived after the departure of the other ambulance. Colonel Smith's bed was "flooded with blood" and there were two spots of blood on the accused's bed which appeared to have been wiped there "by a hand or some part of the body." The "repulsive * * * sickening" odor of paraldehyde was present in the room and there was an empty medicine bottle which had *previously* that day contained two ounces of paraldehyde on a table between the two beds. A duty agent of the "Tokyo Field Office of the CID" arrived at the Smith quarters before 0200 hours and started an official investigation of the incident (R 96-150, 163-166, 265-266; Pros Exs 4, 5, 6, 7, 8, 9; Def Exs B, C).

Colonel Smith was brought into the emergency room of the Tokyo Army Hospital at about 0138 hours, where First Lieutenant Paul R. Rosenbluth, a medical officer, was on duty. The colonel was immediately examined, emergency measures were taken to counteract shock, and glucose was administered intravenously within "a matter of minutes" after his arrival. Later he was given blood transfusions. Because surgery was indicated, Captain William C. Dowling, Chief of the General Surgical Section of the hospital, was called at his home and arrived at the hospital at about 0215 hours. Although Colonel Smith was rational, his condition of shock and low blood pressure were so precarious as to prevent moving him

from the emergency room until about 0400 hours, at which time he was removed to a surgical ward. At about 0530 hours, he began to respond "minimally" and surgery appeared possible within an hour. However, his condition changed for the worse and he expired at 0600 hours in a surgical room to which he had been rushed. His wound, the cause of his death, was described as a "transection of right rental vein, partial transection of right kidney and puncture wound of the inferior vena cava." It could have been inflicted by a knife thrust. The medical officers in attendance were of the opinion that Colonel Smith received "extremely prompt * * * and timely" and proper medical care at the hospital, although Colonel Hardin did not share their opinion. During the time he remained with Colonel Smith at the hospital, Colonel Hardin was "emotionally upset" (R 31-33, 107-108, 151-162, 204-214; Pros Exs 3, 4, 5).

The accused was first taken to a dispensary and then to the Tokyo Army Hospital, arriving at the latter place at about 0250 hours. During the ride in the ambulance, she appeared to be sleeping. At the hospital, she was awake when examined by a medical officer who was of the opinion she was oriented and rational because her speech, although appearing a "little thick," was clear and understandable, she knew who she was and where she was; and she indicated a familiarity with the prior events of the evening. Although she had the odor of paraldehyde on her breath, the ingestion of that substance did not affect her general reaction to questioning. She had about six bruises on her body which could have been caused by falling down some stairs "a day or two before."

56 She was admitted to a guarded prison ward of the hospital at about 0330 hours where two nurses were variously in her presence until she fell asleep at about 0430 hours. Although her comments were unsolicited by the nurses, she talked "from the minute" she arrived on the ward. After stating her name, she said that she had stabbed her husband with "a ten inch Japanese knife" while he was asleep; that she had waited for him to go to sleep for that purpose; that he was sending her "home" because she had been a detriment to his career and prevented him from being promoted; that when informed by him that they were "going home," she told him that if she had to go alone, she would kill him first and then kill herself; that he was being "shanghaied" from his "position" because of her actions and behavior; and that she was glad she had stabbed him but she was "gall[ed]" that she had not stabbed him "on the other side." Both nurses were of the opinion that she was ill because she was variously emotional, hysterical, grief-stricken and witty, going "from one extreme to the other." She frequently asked about her husband's condition and repeated the above statements again and again. Before falling asleep, she asked one of the nurses for a cigarette and the nurse, having none at the time, promised her some when she awakened. When given

some cigarettes upon awakening at 0630 hours, she said to the nurse, "'You keep your word.'" She still had the odor of paraldehyde on her breath when she arrived at the ward and she admitted having previously ingested that substance as well as seconal, a barbiturate and sedative (R 124, 167-197, 267).

Captain James A. Reilly, Medical Corps, a neurologist, conducted an electroencephalogram on the accused on 20 October 1952 and a neurological examination of her on 28 October 1952. There was no evidence of any organic disease of her brain or central or peripheral nervous system, of brain tumor, or of "large mass focal accumulation of dead cells in the brain or spinal cord" (R 197-204).

Lieutenant Colonel Arthur L. Hessin, Medical Corps, Chief of the Neuropsychiatric Service, United States Army Hospital, 8167th Army Unit, and Captain Reilly, aforementioned, together with Major Henry A. Segal, Medical Corps, and Captain William E. Mayer, Medical Corps, all psychiatrists except Captain Reilly, were appointed on 5 November 1952 to a board to determine the sanity of the accused. Her previous medical records from both the Far East Command and the United States, the earliest record dating back to about October 1946, the "military police Criminal Investigation Division reports," and an earlier "Social Service history" obtained from "the deceased" were made available to the
57 members thereof. None of the medical records, with the exception of one, contained a psychiatric diagnosis which described the accused as psychotic, although some of them described her as having behavior disorders, being addicted to sedatives, directing violence toward others, having suicidal tendencies, and displaying other evidence of a violent and apparently uncontrollable temper. These characteristics are considered to be character and behavior disorders, not a mental defect, disease, or derangement. One past record contained a diagnosis of "anxiety reaction" which would be classified as a mental disease. The board unanimously diagnosed the accused's condition as follows:

> "'1. Emotional instability reaction, chronic severe, manifested by extreme emotional outbursts and suicidal and homicidal manifestations. Predisposition severe (numerous previous hospitalizations for similar disorder); stress, minimal (recent arrival in the Far East Command); incapacity, minimal. 2. Intoxication, drug, barbiturate and paraldehyde (terminated 4 October 1952). 3. Addiction, drug, (barbiturate). * * *.'"

and concluded

> "'a. The accused at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong. b. The accused at the time of the alleged offense

was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to adhere to the right. c. The accused does possess sufficient mental capacity to understand the nature of the proceedings against her and intelligently to conduct or cooperate in her defense."

Embodied in the diagnosis of the board is the conclusion that she was not suffering from a mental defect, disease or derangement. The said diagnosis pertains to personality traits and behavior characteristics which are not forms of insanity (R 214-233; Def Exs D-P, incl).

From 30 April 1952 to 15 May 1952, the accused was hospitalized at the United States Army Hospital, 8167th Army Unit, Tokyo, Japan, and was there under the professional care of Colonel Hessin, aforementioned. When admitted, she was in an intoxicated
58 condition and had a lacerated left forearm, the result of a thrust of her fist through a window. Her condition, which was diagnosed as "simple drunkenness" and "emotional instability reaction," was considered to be "one of management." It was intended at that time that she be evacuated to the United States to avoid possible further demonstrations of "emotional instability" which might "prove to be embarrasing and even threatening" to herself and others; however, evacuation was not effected because of her husband's "plea" for one more chance. The couple was given to understand that the "next hospitalization" would be for the purpose of medical evacuation (R 216, 224-225).

Tani stated that from May to September 1952, the accused did not drink alcoholic beverages and the "home life" of the Smith family appeared "normal * * *" [and] happy." However, during and after September 1952, the accused "began to drink again." While drinking, she did not appear to know what she was doing and her speech was difficult to understand. She kept medicine bottles "around the house in various places," some of which her husband and children frequently concealed from her. (After the event of 3-4 October 1952, a number of capsules were found in a second floor closet in a box containing Christmas cards and envelopes. One of these capsules, upon chemical analysis, was found to contain seconal.) On 2 October 1952, the accused, on four or five occasions, fell down some stairs located near the second floor bathroom of her quarters. Tani never saw Colonel Smith abuse his wife. Mrs. Hardin also noticed a change in the accused during and after September 1952. The accused was frequently "upset" and nervous; she cried "a lot"; and she complained of going through menopause (R 113-114, 256-258, 278; Def Ex B).

Having been advised of her rights as a witness, the accused elected to remain silent (R 344).

Captain Clifford W. Draper, Medical Corps, assigned to a dis-

pensary in the accused's housing area, a defense witness, saw the accused as a patient on seven occasions between 18 August 1952 and 29 September 1952. She first complained of menstrual abnormality, for which he gave her a hormone; and she next complained of inability to sleep, and "extreme" restlessness and nervousness, for which he gave her another hormone and phenobarbital (barbiturate), dexedrine and seconal (barbiturate). Thereafter, she had the same complaints as well as stating that she experienced crying spells, for which he variously gave her a variety of
59 medicants including hormones, testosterone, phenobarbital, dexedrine, vitamins and sodium amytal (barbiturate). Specific directions as to dosage were given on each occasion. On the latter date aforementioned (29 September 1952) her condition, although previously somewhat improved, was the same as when he first saw her. She was "extremely agitated" and he suggested immediate hospitalization for psychiatric treatment. She became "more agitated," "broke down and wept" at this suggestion, and "practically pleaded" with him to continue treatment and not hospitalize her, stating as an excuse that she could not leave her family and home at that time. She was not hospitalized and he gave her paraldehyde with proper dosage instructions. He next saw her on 3 October 1952 (when Mrs. Hardin took her to the dispensary) and she "broke down" in his office and cried. She told him of the family's return to the United States, that she was confused by being depressed despite the good news and the possible promotion of her husband to the rank of "general," and that "she thought she must be going crazy." However, he believed that she was coherent "to a certain extent." She asked him for a different sedative because the odor of paraldehyde was offensive to her husband, but he gave her two ounces more of paraldehyde because the barbiturates were habit forming and she was taking "quite a bit of them." He explained to her the reason for continuing the administration of paraldehyde. On that day, he was of the opinion that she needed immediate hospitalization; and he called Colonel Smith and informed him of that fact (R 260-275; Def Ex C).

Medical records of installations in the United States pertaining to the accused show that she received psychiatric treatment, both as an inpatient and outpatient, as early as November-December 1947. The diagnosis at that time, as well as those of other periods thereafter, was as follows:

| *Date* | *Diagnosis* |
|---|---|
| November-December 1947 | Emotional instability reaction, immaturity reaction, not psychotic |
| July-September 1949 | Anxiety state, severe, improved |
| August 1950 | Anxiety reaction |

60

| | |
|---|---|
| January 1951 | Anxiety reaction |
| February-March 1951 | Emotional instability reaction |
| May-June 1951 | Emotional instability reaction |

These medical reports variously indicated chronic alcoholism, addiction to barbiturates, specifically seconal, and wounds self-inflicted during suicidal attempts (R 226-232; Def. Exs D-P, incl).

A blood alcohol test performed on the accused at 0300 hours, 4 October 1952, showed a positive reaction of 0.5 milligrams per cubic centimeter which could have been caused by the ingestion of paraldehyde rather than alcohol. Paraldehyde is a depressant which usually induces sleep. Seconal, a barbiturate, is likewise a depressant which usually induces sleep (R 275-287).

Brigadier General Rawley E. Chambers, Medical Corps, Chief of the Division of Psychiatry and Neurology in the Office of The Surgeon General, Department of the Army, also a defense witness, testified that he saw the accused as a patient on numerous occasions between October 1948 and the approximate date of her departure for the Far East Command. From the beginning, "it became apparent we were dealing with a person who was very unstable and uneasy; who had many anxieties; and who definitely was in need of psychiatric treatment." She was insecure, and felt inadequate, unable to cope with ordinary routine responsibilities, and rejected by her family and friends alike. She thus became incapable of controlling her emotions with the result that she became "hostile" and subject to "explosive" or "terrific • • • emotional outbreaks" which usually required physical restraint. She began to fear insanity and desired reassurance that she was not insane. Thereafter, "somewhere along the line," she started using sedatives such as seconal, nembutal, and "various barbiturates," some of which were regularly prescribed with proper dosage directions which she ignored, to quiet her when she was "upset." When she took an overdosage of these sedatives or drugs which produced "toxic psychosis" of short duration, "her speech became slurred and thick and slow; she became staggering in her gait; her speech at times would be responsive to questions but thick; she would make any wild statement apparently 'out of the blue'; she would repeat them over and over and eventually as the full effect of the
61 drug would become felt, she would go to sleep." However, for a two or three hour period before going into a "deep sleep, the controls which she had rigidly exercised up until this time were loosened but even then it was usually a period of time when increasing tensions mounted and suddenly the thing exploded." When she had no sedatives, she resorted to alcohol, over-

indulgence in which, on one occasion when hospitalized therefor, resulted in giving her an "antabuse treatment." At times during her intoxication, drug or otherwise, she had to be physically restrained from injuring herself or others. On one occasion, she cut her wrists and elbows; on another, she jumped over a second story banister. After one of the "outbreaks," he (General Chambers) diagnosed her case as "emotional instability reaction with barbiturate addiction"; but he then believed, without so stating or writing, and now believes that she suffered from a mental disease, defect or derangement. However, in the terms of the manual, *Psychiatry In Military Law*, TM 8-240, September 1950, her episodes "over a period of many months," including the one for which on trial, are character and behavior disorders. Nevertheless, at the moment of the stabbing of Colonel Smith, assuming drug intoxication at the time, she was subject to an "irresistible impulse." He concurred in general with the board's conclusions and diagnosis, heretofore set forth, except that he believed she was unable to adhere to the right at the time of the commission of the offense (R 287-343; Def Exs R, S).

In rebuttal, Maj Segal, a member of the sanity board, aforementioned, stated that he first saw and examined the accused at about 0805 hours on 4 October 1952. She was oriented as to time, place and person; and there was no evidence of unusual mood, auditory hallucinations and delusions. Her speech was "slightly blurred" but her answers were relevant and to the point. However, "[she] appeared to be nervous, upset; some tremor of the hands and a mild depression was in evidence." She appeared aware of the events of the previous night. When he later that morning informed her of her husband's death, she became "agitated," paced the floor and "exhibited considerable depression and agitation." He subsequently saw her at the formal hearing of the sanity board and at other "infrequent intervals" in his official capacity. He did not believe that the accused was acting under an "irresistible impulse" when she stabbed Colonel Smith because she had no mental disease, defect or derangement. "Toxic psychosis" due to drugs or alcohol is "almost invariably" accompanied by disorientation, confusion, hallucinations, delusions and amnesia. From his examination of her and her former medical records, these conditions were not evident. Moreover, her blood alcohol determination, which could have been caused by the ingestion of paraldehyde rather than alcohol, is not considered as evidence of "marked drunkenness or intoxication," according "to expert authorities in the field". (R 345-354).

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*Discussion*

The accused was found guilty of the premeditated murder of her husband, Colonel Aubrey D. Smith, by means of stabbing him

with a knife at the time and place alleged, in violation of the Uniform Code of Military Justice, Article 118. Prior to a determination of the sufficiency of the evidence to establish the guilt of the accused beyond a reasonable doubt, we will consider certain matters raised by the appellate defense counsel and the record of trial.

a. *Jurisdiction.*

Before the accused pleaded, the trial defense counsel made a motion to dismiss the charge and specification on the ground that the court-martial lacked jurisdiction to try the accused. The motion was denied (R 9-28; Ct Exs 1, 2, 3, 4; App Ex I). Two theories were advanced in support of the motion: one, that upon the death of her husband, the accused was no longer a person "accompanying" the armed forces of the United States within the purview of Article 2, subsection (11) of the Code; and two, that if the contrary be assumed, the court-martial lacked the authority to exercise its jurisdiction in view of the Executive Agreement between the United States and Japan entitled, *Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan*, in effect before and during all times pertinent to the issue. The appellate defense counsel adopted trial defense counsel's argument and supporting data in assigning error.

Considering these two theories separately in the order they appear above, trial defense counsel, as to the former, asserted in substance that the death of the accused's husband terminated jurisdiction of Army courts-martial over her. It was further asserted by same counsel that previously decided cases, each involving a civilian employee of the Army whose employment in an area without the territorial jurisdiction of the United States had been terminated, which held that a change in employment status did not affect the jurisdiction of the court-martial, were inapplicable here because those cases arose either in a theater of operations during time of war or in an occupied territory (citing In re Di-
63 Bartoli, 50 Fed. Supp. 929 (D.C. N.Y. 1943); Perlstein v. United States, 151 F. 2d 167 (3d Cir. 1945); cert. dismissed 328 U.S. 822; Grewe v. France, 75 Fed. Supp. 433 (D.C. Wisc. 1948)).

A better understanding of the point raised is had by a consideration of the article and subsection referred to by counsel (UCMJ, Art. 2, subsec. (11)), and a related subsection of the same article, subsection (10). Subsection (11) provides that the following persons are subject to the Uniform Code of Military Justice:

> "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed

by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico and the Virgin Islands;"

Subsection (10) similarly provides that the following persons are subject to the Uniform Code of Military Justice:

"In time of war, all persons serving with or accompanying an armed force in the field;"

Whether an armed force is "in the field" within the meaning of subsection (10) is not to be determined by the locality in which it may be found, but rather by the activity in which it may be engaged at any particular time (Hines v. Mikell, 259 Fed. 28, 34 (4th Cir. 1919); MCM, 1951, App. 2, p. 413, fn). Thus forces assembled in temporary cantonments in the United States for the purpose of training preparatory for service in the actual theater of war were held to be "in the field" (Hines v. Mikell, supra, at p. 35). Likewise, a merchant ship and crew engaged in transporting troops and supplies to a battle zone were held to constitute a military expedition "in the field" (McCune v. Kilpatrick et al, 53 Fed. Supp. 80, 84 (D.C. Va. 1943); In Re Berue, 54 Fed. Supp. 252, 255 (D.C. Ohio 1944); MCM, 1951, supra) It is apparent from a reading of these two subsections of Article 2 of the
64 Code that a state of war extends courts-martial jurisdiction, in certain limited cases, over persons serving with or accompanying the armed forces to a locality within, as well as without, the continental limits of the United States and its territories.

The wife of a member of the armed forces of the United States who accompanies her husband to, or joins him at, his duty station in a foreign country is a person "accompanying" the armed forces of the United States within the meaning of Article 2, subsection (11), of the Code (see Madsen v. Kinsella, Warden, 343 U.S. 341, 361, and fn. 18, 28 (1952)). There being no doubt therefore that the accused in the instant case enjoyed such status while in Japan prior to her husband's death, whether such status continued after his death is, we believe, vitally linked to the following facts established either by the record or through the proper exercise of judicial notice:

(1) The accused entered Japan upon the invitation of the United States Army, and necessarily with the permission of the Japanese government, solely because of her marital status to a United States Army officer stationed there and to the exclusion of any other status (see Executive Agreement, supra, Art. IX, subsecs. 1 and 2, infra).

(2) The United States Army was responsible for and accomplished her movement to Japan and her logistical and medical support throughout her stay there.

(3) The United States Army was responsible for removing her from Japan coincident with, or within a reasonable time after, the termination of her right to remain there, as in the usual case when the husband member of the armed forces of the United States is permanently transferred away from Japan, or in the case when he dies (see Executive Agreement, supra, Art. IX, subsec. 5, infra).

(4) The accused, after the commission of the offense alleged, "was not allowed to merge with the civilian population" (United States v. Schultz (No. 394), 4 CMR 104, 110), and, in fact, was never released from the physical custody exercised over her by the United States Army before her husband died.

65 We adopt the view that her status as a spouse or dependent ceased to exist upon her husband's death; but in our opinion, based upon, but not limited to, the four facts listed above, she remained a person "accompanying" the armed forces of the United States within the meaning of the Code and subject to the jurisdiction thereof for all purposes herein considered. We find convincing authority for our conclusion in the cases cited by the defense, which hold the true test to be whether the person, when tried, is still accompanying the armed forces of the United States in the area specified regardless of a prior change in status, and not necessarily whether trial occurred in a theater of operations during time of war or in an occupied territory. Were the contrary true, as asserted by the defense, jurisdiction in those cases would have been predicated on Article of War 12, rather than Article of War 2 (see United States v. Schultz, supra, at pp. 111-116). Two of these cases involved offenses committed after the termination of employment and the third involved an offense committed before termination of employment with trial occurring after such termination.

In the *Greve* case, *supra*, cited by the defense, tried under the *Manual for Courts-Martial, U. S. Army, 1928*, the Articles of War then containing provisions almost identical to those presently considered, and certainly connoting the same meaning, employment had been terminated between the time the offense was committed and the date of the trial. In reference to the defense's argument there that "the shooting war" in Germany was over, that the American forces were no longer engaged in military operations, and that the accused, therefore, could no longer be considered as accompanying the Army "in the field," the district court, at page 435, stated:

> "Petitioner's argument ignores the other provision of Article [of War] 2(d), to wit: '* * * all persons accompanying

or serving with the Armies of the United States without the territorial jurisdiction of the United States, * * *.' "

It was held, at page 436, that Grewe came under the above classification as well as that concerning a person serving with or accompanying an armed force "in the field" during time of war; that even though his employment may have terminated, he was nevertheless subject to courts-martial jurisdiction because he was in Germany on a military permit and only with the consent
66 of the theater commander, he was not free to come and go as he pleased, and he was not allowed to merge with the population of Germany; and that although he was " 'serving with' " the Army at the time he committed the offense, he was "at least 'accompanying' the Army" at the time of his court-martial.

The other cases cited by the defense, aforementioned, hold in theory, if not in fact, much the same as the *Grewe* case so as to render specific discussion thereof pointless. However, one significant statement by the circuit court in the *Perlstein* case, *supra*, wherein it was determined Perlstein was still "accompanying" the Army despite the prior termination of his employment, which bears repeating here, is:

> "Under the specific language of Article 2(d) of the Articles of War it is not Perlstein's employment status but whether he was still 'accompanying' the Army at the time the offenses were committed, that furnishes the test of the court-martial's jurisdiction over him."

We perceive no distinction between termination of employment and termination of marital status by reason of the death of a spouse in the military service. Having already concluded that the accused in the instant case was still "accompanying" the Army within the purview of the article in question, it follows that the court-martial had jurisdiction over her and the offense.

The second theory of the defense is that the court-martial, if it had jurisdiction over the accused and the offense, lacked the authority to exercise it because of the Executive Agreement, *supra*, between the governments of the United States and Japan. This poses for the first time to appellate bodies within the military judicial framework a question of interpretation of the said Agreement. As a guide-post, we rely upon a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties (Valentine v. United States ex rel Neidecker, 299 U. S. 5, 10 (1936)). The provisions of this Agreement which we believe are germane to the intent of the signatories are as follows:

* * *

67 "ARTICLE XVII

"2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component and their dependents, * * *. Such jurisdiction may in any case be waived by the United States.

"3. * * *

(f) The United States armed forces shall have the exclusive right of removing from Japan members of the United States armed forces, the civilian component, and their dependents. The United States will give sympathetic consideration to a request by the Government of Japan for the removal of any such person for good cause.

* * *

"4. The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component, and their dependents, may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities which they may find to have taken place. The United States further undertakes to notify the Japanese authorities of the disposition made by the United States service courts of all cases arising under this paragraph. The United States shall give sympathetic consideration to a request from Japanese authorities for a waiver of its jurisdiction in cases arising under
68 this paragraph where the Japanese Government considers such waiver to be of particular importance. Upon such waiver, Japan may exercise its own jurisdiction. * * *"

"ARTICLE I

"In this Agreement the expression—

* * *

(b) 'civilian component' means the civilian persons of United States nationality who are in the employ of, serving with, or accompanying the United States armed forces in Japan * * *

(c) 'dependents' means

(1) Spouse * * *

* * *"

"ARTICLE IX

"1. The United States shall have the right to bring into Japan for purposes of this Agreement persons who are members of the United States armed forces, the civilian component, and their dependents.

"2. * * * Members of the United States armed forces, the civilian component, and their dependents, shall be exempt from Japanese laws and regulations on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan.

"* * *

"5. If the status of any person brought into Japan under paragraph 1 of this Article is altered so that he would no longer be entitled to such admission, the United States authorities shall notify the Japanese authorities and shall,
69 if such person be required by the Japanese authorities to leave Japan, assure that transportation from Japan will be provided within a reasonable time at no cost to the Japanese Government."

The definition of "civilian component" in the Agreement, which is strikingly similar to a portion of the language employed in Article 2, subsection (11), of the Uniform Code of Military Justice, clearly shows that the wife of a member of the armed forces of the United States is a member of the "civilian component" as well as a "dependent." Although her status as a "dependent," by strict interpretation of the Agreement, ceases to exist upon her husband's death, as we have so held in this case, there is nothing in the Agreement which remotely suggests an intention to consider that her dual status as a person "accompanying the United States armed forces in Japan" likewise ceases to exist. In fact, the opposite intention is readily apparent in view of the provisions of the Agreement which relate to the responsibility of the United States authorities for removing such persons from Japan, and for the investigation and trial of such persons upon their commission of offenses there, and the facts that such persons enjoy a unique status and do not acquire any right to permanent residence or domicile in the territories of Japan. We arrive, therefore, at the inescapable conclusions that the court-martial, in the instant case, had the authority to exercise its jurisdiction over the accused and the offense and that the Executive Agreement conferred to it (the court-martial), a waiver being absent, the exclusive right to do so.

b. *Sanity.*

The accused's mental condition, as relates to criminal responsibility at the time of the commission of the offense alleged, became a predominant issue at the trial and on appeal before this board. The only point of disagreement between Brigadier General Rawley E. Chambers, the defense expert witness, on the one hand, and the prosecution's evidence and expert witnesses, on the other hand, was whether the accused was able to adhere to the right at the time she allegedly stabbed her husband. The court, implicit in its findings, resolved the issue of fact against the accused.

From our independent evaluation of all the evidence, it appears to us that the accused, for a considerable period prior to her
70 alleged act, displayed a high degree of emotional instability, otherwise considered a character and behavior disorder, or, in the language of the *Manual for Courts-Martial, United States, 1951*, a "defect of character, will power, or behavior * * *." The defense expert witness appears to agree with the prosecution's evidence and witnesses that the accused displayed evidence of such condition at the time with which we are concerned. This condition does not affect the criminal responsibility of an accused and constitutes no defense before a court-martial unless the accused, at the moment of the act, is unable to adhere to the right as a result of mental defect, disease or derangement (see MCM, 1951, subpar. 120b, p.200).

General Chambers stated his belief that an "irresistible impulse" existent at the moment the accused allegedly stabbed her husband rendered her unable to adhere to the right and that this was the basis for his opinion that she was then suffering from a mental defect, disease or derangement. He also indicated his belief that, although he had no basis in fact therefor, a condition of "toxic psychosis" of short duration as a result of drug ingestion may have been likewise existent at the crucial moment and would also have the effect of relieving the accused from criminal responsibility. Both of the prosecution expert witnesses on the question, however, expressed their belief to the contrary and that the accused was fully accountable in the criminal sense for her alleged act. A previous board of four medical officers, of which both of the said prosecution expert witnesses were members, unanimously reached the same conclusions. One of the said expert witnesses for the prosecution expressly stated his further opinion that the accused was not motivated by an "irresistible impulse" and that there was no evidence of "toxic psychosis" from his examination of the accused or her past medical records. A blood alcohol test performed on the accused about three hours after the incident which revealed a positive reaction of 0.5 milligrams per cubic centimeter is not considered as evidence of "marked drunkenness or intoxication."

The conflicting opinions substantially set forth above make it desirable to set forth here certain excerpts on the "irresistible impulse" doctrine from TM 8-240, *Psychiatry in Military Law*, a manual which, together with other authorities on the subject not here set out, we may use as a guide on this question and to which the various witnesses referred. Section II, paragraphs 5*a* and 5*b*, at pages 4 and 5, thereof, provide:

71 "*a*. If the accused knows that the act is wrong, yet cannot 'adhere to the right' because of some mental disorder, he is *not* mentally responsible. This concept recognizes that if a person, because of mental illness, is wholly deprived of the power of choice or of volition, he does not possess the freedom of action essential to criminal responsibility. This presents the medical officer squarely with the thesis of irresistible impulse. It should be applied in any given case for cogent reasons only, and with great discretion, since it lends itself readily to abuse. Any accused can say that, when he committed the assault, theft or murder, something made him do it, and that he could not restrain himself. The medical officer will view such claim with extreme caution, in view of its dangerous potentialities. The 'adhere to the right' or 'irresistible impulse' doctrine is not intended to apply to actions committed while drunk, nor to the furies and frenzies of an ill-tempered man who is free of psychosis. Nor should it be used to exculpate aggressive character or behavior disorders. Actually, the doctrine is but seldom applicable, and its application will be limited to actions committed by persons with sick minds—actions perpetuated because of those sick minds. In general, only two kinds of mental illness can be considered—compulsive psychoneuroses and psychoses. A psychoneurosis is a chronic disease; it is a way of life. The medical officer will be properly skeptical of an allegedly irresistible impulse that was, for the first time in the subject's life, suddenly generated just before the commission of the crime. Before testifying that an accused did the act because of an irresistible compulsion, the medical officer should be satisfied first, that the act is part of a repeated psychoneurotic pattern; second, that the patient exhibited mounting anxiety or tension which was relieved by the theft, arson (or whatever the compulsion was); and third, that the compulsion generated by the illness was so strong that the act would have been committed even though a policeman had been at the accused's side at the time the opportunity to commit the offense presented itself. It is evident that only very rarely, if indeed ever, do offenses committed within the
72 framework of a supposed compulsive psychoneurosis satisfy all three criteria, particularly the third. In con-

sequence, for practical purposes, true irresistible impulse, or 'inability to adhere to the right' occurs only in psychotics. Since its legitimate applicability is extremely limited, the doctrine of irresistible impulse will be seldom invoked.

"*b.* Irresistible impulses in psychotics usually come about in connection with commanding voices, persuasive visions, or overwhelming delusions which, by their nature and within the frame of reference of the psychosis, compel the patient to commit the act."

When we consider the medical evidence in relation to the "irresistible impulse" doctrine, together with the evidence relating to the accused's statements about her act, her actions before and after the incident, her prior threat to kill her husband, and her procurement and attempted use of a second knife after the maid Tani had relieved her of the fatal weapon and had left to summon aid, we arrive at the conclusions that the accused, beyond a reasonable doubt, was so far free from mental defect, disease or derangement at any time pertinent to the issue as to be able concerning the particular act charged, both to distinguish right from wrong and to adhere to the right. Moreover, it appears to us that defense's own evidence fails to meet the burden of supporting its claim to the contrary. Apposite to the problem here is the language of the court in *Holloway v. United States*, 148 F. 2d 665, at page 667 (U. S. C. A. D. C. 1945) that:

"The institution which applies our inherited ideas or moral responsibility to individuals prosecuted for crime is a jury of ordinary men. These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion. Psychiatry offers to us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that the verdict shocks the conscience of the court."

73 Obviously, from the conclusions we have heretofore reached, we are unable to disagree with the court's apparent determination of the sanity issue under the guidance of instructions which we consider correct.

Related to the sanity issue is appellate defense counsel's assertion that the law officer committed reversible error in failing to instruct the court that physiological, psychiatric and emotional derangements, idiosyncracies and aberrations of the accused, not amounting to legal insanity, may be considered as bearing upon the mental

ability of the accused to premeditate and form a specific intent to kill. We are unable to find a request in the record for such an instruction; however, the fact that a request may have been made and refused is not determinative of the issue. The general rule which we prefer to follow appears to be stated in *Fisher* v. *United States*, 149 F. 2d 28, at page 29 (U. S. C. A. D. C. 1945), a case involving refusal below of a similar instruction, as follows:

> "The instruction confuses the issue of insanity with the question whether the psychopathic characteristics of the appellant prevented him from forming the deliberate intent necessary to constitute first degree murder. For that reason alone it was properly refused. * * * To give an instruction like [the one requested] is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes."

It follows that we consider the assignment to be without substantial merit. We also consider other assignments of error in connection with the law officer's refusal to give certain requested instructions relating to the sanity issue meritless because they were either generally covered in the instructions given or incorrect; however, we deem it inappropriate to belabor such assignments to any greater extent.

We have given careful consideration to appellate defense counsel's motion that we request a new psychiatric evaluation by a board of medical officers. The record shows that a thorough mental evaluation of the accused was made prior to trial by competent and experienced medical officers, some of whom testified at length at the trial. The members of the court-martial saw and heard all the witnesses, and had an opportunity to observe the accused.
74 The conclusions of the experts as to mental responsibility of the accused and the findings of the court-martial appear to have been arrived at after the most careful and painstaking inquiry. In view of all these considerations we can only conclude that further psychiatric examination would serve no useful purpose in disposing of the issues determined herein. The motion is therefore denied.

Appellate defense counsel also asserts that the adherence of the prosecution's medical witnesses to the "opinions * * * expressed in TM 8-240" deprived the accused of a trial based "on untrammelled, unrestricted and disinterested testimony." It is contended that the "arbitrary action of the Department of the Army in issuing such a publication and the unwarranted adoption of the same by the prosecution's witnesses * * * trenched upon those fundamental notions of fair play and justice so essential to due process of law." It is also asserted that the said manual was improperly used in the

impeachment of General Chamber's testimony. Counsel points out that by asking the witness to read portions of the manual aloud, incompetent evidence was placed before the court.

Consideration of these two assignments of error requires an understanding of the function and effect of Department of the Army Technical Manual 8-240, *Psychiatry in Military Law*, September 1950. The technical manual was "published for the information and guidance of all concerned," and it "defines and explains the legal standards applied in military law to determine whether a person was mentally responsible at the time of an offense and has the requisite mental capacity to be tried by court martial." The technical manual does not promulgate the law relating to insanity. Paragraph 120 of the Manual for Courts-Martial, United States, 1951; and the relevant decided cases constitute the only authoritative statement of legal principles. The technical manual contains merely information and instructional matter on the subject, primarily for the use of medical experts in investigating or testifying to mental responsibility for crime (AR 310-20, pars. 21, 22). The fact that lawyers and psychiatrists use different language in the general field of "mental" aberrations makes useful a treatise which undertakes to bridge the gap between the two vocabularies, and the translation of psychiatric observation into legal categories is facilitated by Technical Manual 8-240.

75 Thus, it appears that the prosecution witnesses were at liberty—in fact were to be encouraged if they so desired—to use the language of TM 8-240 and to benefit from its analysis. Just as any other medicolegal treatise, it may be used or not in the discretion of the expert witness. The defense has no basis for complaint on this ground.

With respect to General Chamber's testimony, the record of trial reveals that the only use made of TM 8-240 on cross-examination was to ask the witness to phrase his medical conclusions, already testified to in his own language, in terms helpful in applying the legal criteria. We believe that such use of the manual was proper.

c. *Admissibility of Certain Evidence.*

The trial defense counsel objected to the admission in evidence of: one, the testimony of the maid Tani relating to the statement of Colonel Smith that the accused had stabbed him; and two, the testimony of the two nurses relating to the accused's statements made in their presence. These two matters were also assigned by appellate defense counsel as prejudicial error.

The first objection listed above was made by trial defense counsel specifically on the ground that the statement was hearsay and did not meet the requirements for admissibility as a dying declara-

tion (R. 54, 60; App. Ex. 2). Conceding *arguendo* that it was not a dying declaration or a spontaneous exclamation, we hold that the objection was properly overruled because of the well recognized rule that an undenied accusation made in an accused's presence that he has participated in an offense may be regarded as incriminating evidence which is admissible (MCM, 1951, subpar. 140*a*, p. 251; Egan v. United States, 137 F. 2d 369, 380-381 (8th Cir. 1943); Gentili v. United States, 22 F. 2d 67, 68-69 (9th Cir. 1927)).

The second objection listed above was made by trial defense counsel specifically on the ground that the accused was in no condition to make a voluntary statement at the time (R. 184, 194). The testimony of the nurses as to the accused's hysterical state part of the time was obviously the basis of the objection. Generally, an impairment of the mental faculties short of insanity at the time a statement is made by an accused does not affect the admissibility of the statement, but such impairment is evidence to be con-
76 sidered by the court in determining the weight or effect to be given the statement (see Mergner v. United States, 147 F. 2d 572 (C. A. D. C. 1945); Bell v. United States, 47 F. 2d 438, 439-440 (C. A. D. C. 1931); and People v. Lehew, 287 Pac. 337, 340 (Calif. 1930)). Appellate defense counsel additionally asserts that the admission in evidence of these statements was error because the accused had previously been officially interrogated by one Agent VanDyke, was, at the time of making the statements, in official custody and suspected of having committed a crime, and had not been advised of her rights under Article 31 of the Code prior to making the statements in question. Such theory, however, appears to us as forever barring the receipt in evidence of any spontaneous utterance made to a disinterested party once an accused has been taken into custody or interrogated. Here, the statements were unsolicited and the accused was not being investigated by the parties who were present when they were made (see United States v. Creamer (No. 179), 3 CMR 1, 7-8; see also CM 360336, Sanchez, — CMR —, 5 Mar. 1953). Therefore, we hold that the objection was properly overruled, the assignment of error is without substantial merit and the statements were admissible.

d. *Instructions as to Lesser Offenses.*

Appellate defense counsel asserts that the law officer committed fatal error by instructing the court that it might find the accused guilty of unpremeditated murder if it found that she was engaged in an act inherently dangerous to others and evincing a wanton disregard of human life. We observe that the law officer also instructed on the intent to kill or inflict grievous bodily harm form of unpremeditated murder.

We concede, on the basis of the recent decision of the United

States Court of Military Appeals in the *Joe L. Davis* case (United States v. Joe L. Davis (No. 646), — USCMA —, 14 May 1953) that the evidence in the instant case in no way raised the offense involved in the instruction complained of. However, we believe that this case is clearly distinguishable from the *Davis* case because the accused was found guilty of premeditated murder as charged. Thus, the error, since it was not considered by the court, was harmless (see State v. Zupkosky, 21 A. 2d 771, 775 (N. J. 1941)).

*e. Motion for New Trial.*

77 The accused petitioned The Judge Advocate General of the Army for a new trial under the provisions of Article 73 of the Uniform Code of Military Justice. In accordance with that article, The Judge Advocate General referred this petition to the board of review for action.

In her petition the accused asserts in substance that new evidence has been discovered which would probably produce "a substantially more favorable result for the accused"; that the conscious suppression by trial counsel of evidence favorable to the accused was fraud on the court, constituted a denial of due process of law, and voided the findings and sentence; that such suppression prejudiced the accused's substantial rights; and that had such evidence been introduced, it probably would have resulted in a finding of not guilty. These assertions were based upon the facts that Captain William E. Mayer, Medical Corps, a member of the board of officers convened prior to trial to inquire into the accused's sanity, signed the board's report because he believed that the conclusions set forth therein met the requirements contained in TM 8-240, *Psychiatry in Military Law;* that if the same questions had been propounded to him in civilian practice, where he was not subject to the limitations imposed by the cited technical manual, he would not have fully concurred in the conclusions reached by the board because, "from a purely medical point of view," he was of the opinion that the accused was suffering from a mental defect, disease or derangement at the time of the alleged offense, that she was incapable of "setting out to kill her husband in a calculated, premeditated way," and that her ability to adhere to the right was impaired. His opinion as to her ability to adhere to the right was based on the belief that the legal test contained in the aforesaid technical manual that an accused would not have committed the act charged had a policeman been present at the time is not in any way determinative of the diagnostic problem which an accused's mental condition presents from a purely medical point of view so as to preclude a medical determination that such accused's ability to adhere to the right was impaired. However, he signed the board's report because he believed that if a policeman had been present, the accused would not

have consciously "stabbed" her husband to death although she would have "struck" him. Captain Mayer stated that this was his opinion prior to trial and that he so informed trail counsel and assistant trial counsel prior to trial. Captain Mayer was not called as a witness by the prosecution. Defense counsel asserts that he was not informed of the matter, although he was present when the report was typed and witnessed the signing of it by several members; that he did not become aware of the information until after the trial; and that the trial counsel's constant reference to the board report as being the unanimous opinion of the members was improper.

77a We are not moved to the view that this testimony, if produced at the trial, would have resulted in a finding favorable to the accused for the reason that Captain Mayer did not say that the accused was unable to adhere to the right, but rather that her ability to do so was *impaired*. Under the *Manual for Courts-Martial, United States, 1951*, the impairment must not only be the result of mental defect, disease or derangement, but must completely deprive the accused of his ability to adhere to the right as to the act charged (MCM, 1951, subpar. 120*b*, p. 200). But assuming, *arguendo*, that Captain Mayer's alternate opinion went so far as to agree with that of defense's expert witness, we believe that the defense is barred from relief because it failed to exercise due diligence to discover the evidence before trial. The witness was not only available to defense counsel, but defense counsel admits that he (defense counsel) was present when several members of the board signed the report. Where, as here, the main issue in a case is the sanity of the accused, it seems incredible to us to conclude that due diligence has been exercised when the against the accused prior to trial. Moreover, we think no fraud defense counsel admits that he did not interview the witnesses has been perpetrated upon the court because the witness, in applying the legal test recognized in military law, the one which the court was bound to follow, was in complete accord with the other members of the board.

No good cause for the granting of relief under Article 73 of the Code therefore appears.

f. *Sufficiency of the Evidence.*

We turn now to a consideration of the evidence to determine its sufficiency to support the findings of guilty of premeditated murder.

Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended (MCM, 1951, subpar. 197*d*, p. 352). When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution (ibid.).

"It is a cardinal rule of law that questions of fact are determined in forums of original jurisdiction or by those which are expressly granted the authority by constitution or statutes" (United States v. McCrary (No. 4), 1 CMR 1, 3). We have no hesitancy—

* * *

78 Department of the Army
Office of the Judge Advocate General
Washington 25, D. C.

In the Board of Review, United States Army, before SCARBOROUGH, BERKOWITZ and CHALK, Members

CM 360857

UNITED STATES

*v.*

DOROTHY K. SMITH, dependent wife of Colonel Aubrey D. Smith, deceased, U. S. Army, G-4 Section, Headquarters Far East Command, APO 500.

HEADQUARTERS AND SERVICE COMMAND
FAR EAST COMMAND

Sentence adjudged 10 January 1953. Approved sentence: Confinement for life.

Appellate Counsel for the Accused: Brigadier General Adam Richmond, USA (Ret.), Lieutenant Colonel George M. Thorpe, JAGC, First Lieutenant John W. Fuhrman, JAGC.

Appellate Counsel for the United States: Lieutenant Colonel William R. Ward, JAGC, First Lieutenant Kenneth A. Howard, JAGC.

DECISION ON RECONSIDERATION—November 16, 1953

Upon original review of the record of trial in the above-entitled case, the board of review, by its decision dated 26 May 1953, affirmed the approved findings of guilty of premeditated murder, in violation of the Uniform Code of Military Justice, Article 118, and the sentence to confinement at hard labor for life.

Upon motion of appellate defense counsel for reconsideration by the board of review of additional evidence on the issue of insanity, the United States Court of Military Appeals ordered the original record of trial returned to The Judge Advocate General of the Army for reference to the board of review for further consideration in accordance with the motion. Upon receiving
79 the record on 24 August 1953 the board, for good cause shown, on 15 September 1953, ordered a rehearing before

it, which was in due time accomplished and arguments were heard by appellate defense and Government counsel.

I

At the rehearing, the board received from appellate defense counsel a report of a board of three medical officers convened at Letterman Army Hospital subsequent to the date of trial to inquire into the accused's mental condition at all times pertinent to the issue. The board also received from appellate defense counsel a report of two civilian expert consultants to The Surgeon General, one in Psychiatry and one in Clinical Psychology, who conducted an examination of the accused at the same facility and at relatively the same time. The diagnoses of each group was identical but the civilian consultants concluded that the accused, at the time of the commission of the offense, was unable to distinguish right from wrong or to adhere to the right. The three medical officers' conclusions were as follows:

"(a) It is the opinion that the accused was so free from mental defect, disease, or derangement with respect to the act charged as to be able to distinguish right from wrong.

"(b) At the specific time of the commission of the alleged offense, the individual's condition is estimated to have been such as to markedly impair and diminish her ability to adhere to the right.

"(c) It is the opinion that at the time of trial, the accused possessed sufficient mental capacity to understand the nature of the proceedings against her and to cooperate in her defense.

"(d) Because of the degree of drug intoxication existing at the time the alleged offense was committed, it is believed that the accused was not capable of having the degree of intent and willfulness which would constitute premeditation."

It is readily apparent that the conflicting medical opinions now before the board are substantially the same as those considered and evaluated in the previous decision in that acceptance of one against the other, insofar as the sanity issue is concerned, inevitably must result in affirmance or disaffirmance of the findings in whole or in part and the sentence. After carefully considering and weighing all of the evidence relating to the issue *de novo*, the board finds that the accused was mentally responsible for her acts at all times pertinent to the issue and was capable of forming the specific intent to kill and considering the act intended so as to constitute premeditation. The board further finds that the accused, at the time of the trial, was able to understand the nature of the proceedings against her and intelligently to cooperate in her defense.

80

Appellate defense counsel, at the rehearing before the board, requested the board to take the testimony of Colonel Emmett B. Litteral, Medical Corps, a member of the board of medical officers convened at Letterman Army Hospital, aforementioned, at some future date. The request was not supported by any evidence of the witness' expected testimony but it is assumed that he would testify in accordance with the following remarks contained in paragraph 9 of the board report:

> "The medical officers who have examined Mrs. Smith and whose names will be signed to these findings, function in a somewhat differently structured medico-legal context than their civilian colleagues who have also examined the accused. By this, it is inferred that the military psychiatrists [sic] latitude is in effect somewhat diminished as to what findings he may make by the established body of medico-legal policy and precedent now codified in part in TM 8-240. It is the impression of the undersigned that in a civilian jurisdiction a much more liberal interpretation of issues of mental responsibility in crimes of violence is frequently observed. These statements are made in an attempt to explain some of the difference of opinion as to the accused's responsibility expressed by military and civilian psychiatrists."

That a marked distinction exists between the technical medical view of mental responsibility and the medico-legal view of mental responsibility, the latter being the yardstick in military law, is so well established and recognized as to require no elaboration here. The problem was thoroughly explored in the former appellate proceedings and our views are consistent with those expressed there. As we have decided that no favorable result to the accused would attend our granting the request, the same is hereby denied.

81

II

After the rehearing before the board of review, appellate defense counsel submitted, and we have accepted, a supplemental assignment of errors in which it is asserted that reversible error was occasioned by the underscored portion of the following instruction of the law officer:

> "If, *in the light of all the evidence, including that supplied by the presumption of sanity*, the court has a reasonable doubt as to the mental responsibility of the accused at the time of the alleged offense, the court must find the accused not guilty of that offense." (Underscoring supplied)

Appellate defense counsel relies primarily upon the case of *State v. Green*, 6 P. 2d 177 (Utah, 1931), wherein the Supreme Court

of the State of Utah held that when evidence tending to show that the accused person was insane enters into the case, the presumption of sanity, not being evidence, disappears and may not be considered by the jury; and that an instruction, in such a setting, which allowed the jury to consider the presumption as evidence was reversible error.

Appellate Government counsel, on the other hand, argues in substance that the instruction conforms to the language of the Manual which provides:

> "If, in the light of all the evidence, including that supplied by the presumption of sanity, a reasonable doubt as to the mental responsibility of the accused at the time of the offenses (120b) remains, the court must find the accused not guilty of that offense." (MCM, 1951, subpar. 122a, p. 202)

and that we need go no further for authority to overrule the assignment of error. Appellate Government counsel points out that the Manual provision above-quoted conforms to the language employed in *United States* v. *Davis*, 160 U.S. 469, 488 (1895), a case frequently cited on insanity problems, wherein it was stated:

82 > "If the whole evidence, *including that supplied by the presumption of sanity*, does not exclude beyond a reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal." (Underscoring supplied)

We have no doubt that the Manual provision indirectly under attack has its root in the Davis case, *supra* (see Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 168).

From what has been said thus far, it is readily apparent that our acceptance of defense's position would result in our denouncing the Manual language as not controlling. This we are not prepared to do for reasons which will hereafter become crystal clear.

Our independent research has revealed authorities too numerous to mention here which hold contra to those cited by the defense. In fact, the Supreme Court of Utah, in applying the law of Nevada in a negligence case, stated:

> "The law of Nevada, lex loci, and not the law of Utah, lex fori, must govern on the question as to whether the jury could consider and weigh the presumption of negligence, along with the other evidence on the question of defendant's negligence and proximate cause. The trial court applied the Nevada rule, which was the correct procedure."

In *Commonwealth v. Cox*, 100 N.E. 2d 14, 16 (Mass., 1951), the following language from an earlier case (Commonwealth v. Clark, 198 N.E. 641, 645 (Mass., 1935)) was quoted with approval:

> "The fact that a great majority of men are sane, and the probability that any particular man is sane, may be deemed by a jury to outweigh, in evidential value, testimony that he is insane. * * *. It is not * * * the presumption of sanity that may be weighed as evidence, but rather the rational probability on which the presumption rests."

In *Tatum v. United States*, 190 F. 2d 612, 615 (1951), the United States Court of Appeals, District of Columbia Circuit, in discussing mental responsibility, referred to the Davis case, *supra*, as the "leading authority on the subject" and quoted with approval the language we have heretofore quoted from that case.

83 As there is respectable civilian authority which supports the Manual provision, we advert to the rule which provides that the Uniform Code of Military Justice and the *Manual for Courts-Martial, United States, 1951*, in the absence of conflict, share an identical authoritative position (United States v. Krull (No. 934), 3 USCMA 129, 11 CMR 129). Since we find no such conflict, the Manual provision has the force of law (see UCMJ, Art. 36) and is binding upon us. Accordingly we hold that the assignment of error is without merit.

*Action by the Board*

For the reasons stated, the board of review, upon reconsideration, finds the approved findings of guilty and the sentence as approved by proper authority correct in law and fact, and having determined, on the basis of the entire record, that such findings of guilty and sentence should be approved, the same are hereby

*Affirmed*.

RICHARD SCARBOROUGH,
CHARLES J. BERCOURT,
JOSEPH L. OFULT.

84 United States Court of Military Appeals

No. 3370

UNITED STATES, APPELLEE

*v.*

DOROTHY K. SMITH (DEPENDENT WIFE OF COLONEL AUBREY D. SMITH, DECEASED), APPELLANT

ON PETITION OF THE ACCUSED BELOW [1]

BRIG. GEN. ADAM RICHMOND, U. S. Army (Retired), LT. COL. GEORGE M. THORPE, U. S. Army, and 1ST LT JOHN W. FUHRMAN, U. S. Army, for Appellant.

LT. COL. WILLIAM R. WARD, U. S. Army, and 1st LT. KENNETH A. HOWARD, U. S. Army, for Appelle.

OPINION OF THE COURT—Decided December 30, 1954

PAUL W. BROSMAN, Judge:

A general court-martial convened at Tokyo, Japan, found the accused woman guilty of the premeditated murder of her husband, Colonel Aubrey D. Smith, United States Army—in violation of the Uniform Code of Military Justice, Article 118, 50 USC § 712. She was sentenced to be imprisoned for life. The convening authority approved the findings and sentence, and a board of review has affirmed. This Court granted her petition for review of the case.

II

At the trial, the defense assailed the jurisdiction of the court-martial over this civilian accused—and the same matter has been raised here. In this connection we observe that, at the time of his death, Colonel Smith was stationed in Tokyo, and that
85 the accused was there as his dependent. Therefore, at all times prior to his death, she was accompanying the Armed Forces, within the meaning of Article 2(11) of the Uniform Code, 50 USC § 552. Accordingly, she would have been subject to trial by a court-martial. See Madsen v. Kinsella, 343 US 341.

We do not perceive how this status terminated at any time before the accused's trial. Colonel Smith died at about 6 a. m. on the morning of October 4, 1952. Mrs. Smith was then in military custody and under guard as a result of having assaulted him several hours before. She remained a prisoner—or at least was hospitalized in a military medical facility—until the date of the trial. Thus,

[1] CM 360857.

she cannot be said to have "merged" with the Japanese population—with the result that she must have remained subject to military jurisdiction. See United States v. Garcia, 5 USCMA 88, 17 CMR 88; United States v. Schultz, 1 USCMA 512, 4 CMR 104. Indeed, the circumstances establishing jurisdiction are much stronger here than in the Garcia case, and our discussion there—together with the opinion of the board of review in the instant case[2]—fully disposes of the jurisdictional contention.

## III

The accused also complains that fatal error was committed in admitting in evidence a statement made by Colonel Smith to his Japanese maid to the effect that his wife had stabbed him. The maid had been called late at night by Colonel Smith and discovered him lying in bed disabled by what proved to be a knife wound. Since it is improbable that there was any sort of expectation of death on the Colonel's part when he made the remark, we feel sure that its language was inadmissible as a dying declaration. See Manual for Courts-Martial, United States, 1951, paragraph 142*a*; United States v. DeCarlo, 1 USCMA 91, 1 CMR 90.

86 However, a forceful argument has been made for the reception of the deceased's utterance as a spontaneous exclamation, made under circumstances reflecting no occasion to deceive. See Manual, supra, paragraph 142*b*; United States v. Mounts, 1 USCMA 114, 2 CMR 20. While we incline to accept this view, we shall assume arguendo that the law officer erred in admitting the statement. Yet the comment of Colonel Smith pertained only to the identity of his assailant. The evidence—forthcoming from both Government and defense witnesses[3]—was so overwhelming on

[2] 10 CMR 350. In view of our holding on this point we need not consider claims of military jurisdiction grounded on Article 3 of the Uniform Code, 50 USC § 553. That Article—providing for continuance of jurisdiction over serious offenders who cannot be tried by American civilian courts—was recently upheld by the Court of Appeals for the District of Columbia, Toth v. Talbott, 215 F 2d 22, cert. granted 348 US 809.

[3] The psychiatric testimony having to do with Mrs. Smith's personality disorders—which occasionally eventuated in aggressive acts against others—itself suggests strongly that she committed the instant homicide. In addition to inclination, she possessed opportunity for the misdeed. Also, she was seen with the death weapon, an Okinawan knife which she had requested the Japanese maid to seek and deliver into her possession several days prior to the homicide. As if to remove all conceivable doubt of her guilt, Mrs.

this point that any error relating to identity become quite insignificant. As revealed by the evidence, as well as by the closing arguments of counsel, the only real issue at the trial was the state of mind—the mental condition—of the accused when she stabbed the Colonel. Since his statement sheds no light whatever on this subject, its reception could not have been prejudicial.

IV

A further assault has been made in this Court on the principles of military law dealing with mental responsibility—one stemming chiefly from a recent thoughtful and scholarly opinion of the United States Court of Appeals for the District of Columbia. United States v. Durham, 214 F. 2d 862. Prefatory to a consideration of this attack, it must first be noted that the long-established military test of mental responsibility is phrased in terms of whether the accused was, at the time of the alleged offense, so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong and to adhere to the right. Manual, supra, paragraph 120*b*; 87 Manual for Courts-Martial, U. S. Army 1949, paragraph 110*b*; Manual for Courts-Martial, U. S. Army, 1928, paragraph 78*a*. See also Winthrop's Military Law and Precedents, 2d ed., 1920 Reprint, pages 294-6.

Emphasis is placed—it will be observed—on the distinction between the "mental defect, disease, and derangement," which may exculpate from criminal liability, and the "mere defect of character, will power, or behavior," which will not serve to exonerate an accused. This distinction meshes well with the content of the Joint Armed Forces' Definitions of Psychiatric Conditions, promulgated in June 1949—only a short time after the appearance of the 1949 Manual for Courts-Martial.[4] These Definitions include a generic group of "character and behavior disorders"—among them those which theretofore had been termed "pathological personality" types, as well as types previously regarded as suffering from a "constitutional psychopathic state" or a "psychopathic personality." See SR 40-1025-2, paragraph 6. We construe the character and behavior disorders, dealt with in the Joint Definitions, as simply forming the medical prototypes of the 1951 Manual's reference to

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Smith made numerous admissions having to do with the fatal stabbing, such as "It is too bad I didn't get him in the heart." The board of review sets out a lengthy and detailed presentation of the evidence in its original opinion in the case, printed at 10 CMR 350.

[4] SR 40-1025-2; NAVMED P-1303; AFR 160-13A, dated June 1949.

"character and behavior disorders." Cf. United States v. Poe, 68 BR 141. Indeed, those Definitions, when considered in conjunction with the Manual for Courts-Martial, provide the psychiatric witness before a court-martial with an infinitely clearer picture of what is, or is not, a mental disease than is afforded him in any civilian system of law administration of which we are aware. This clarity, of course, leads to greater agreement among psychiatric witnesses in military law administration, and operates sharply to reduce the occasions for courtroom battles of alienists.[5]

The opinion of the Court of Appeals in Durham v. United States, supra, requires that unless the jury "believe beyond a reasonable doubt either that he [the accused] was not suffering from a diseased or defective mental condition or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity." Disease is said to signify "a condition which is considered capable of either improving or deteriorating," while a defect exists when there is present a condition "not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."

It is evident that the law of mental responsibility as it now exists in the District of Columbia, is far more liberal than the traditional common law view, or than that obtaining in most American jurisdictions. Under the McNaughten Rules—which reign in a majority of states, as well as in England—an accused is deemed responsible for his acts if, at the time of their performance, he knew the difference between right and wrong with respect thereto, as well as the nature and quality of those acts.[6] Weihofen, Mental Disorder as a Criminal Defense, 1954, chapter 3. A number of states, as well as the Federal courts, also exonerate from criminal liability for acts committed as the result of an irresistible impulse. Davis v. United States, 165 US 373; Weihofen, supra, pages 81-100.

So far as can be determined, the principle of the Durham case

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[5] Of course, there is still ample room for differences of judgment, since psychiatric ailments shade with imperceptible gradations from one into another. Consequently, in a borderline case the diagnosis presented by the forensic psychiatrist may well be swayed by his judgment as to appropriate legal consequences.

[6] Sometimes this is stated as "nature and consequences" of the act. There is some question as to what is added by the latter part of the formula—for many courts seem to hold that knowing the nature and quality of the act signifies merely knowing that it is wrong. See Weihofen, Mental Disorder as a Criminal Defense, 1954, pages 72-4. See also, Zilboorg, The Psychology of the Criminal Act and Punishment, 1954, pages 16-18.

receives legal support in the United States almost exclusively from certain New Hampshire decisions. See e. g. State v. Pike, 49 NH 399. Scotland, too, seems to apply a like doctrine. Also a Report of the British Royal Commission on Capital Punishment, 1949-1953, favors the particular extension of the McNaughten Rules which is embodied in the Durham decision. Incidentally, a survey of
89 this very excellent Report—as well as the voluminous Minutes of Evidence submitted to the Royal Commission—makes clear that the Court of Appeals for the District of Columbia was substantially influenced thereby.

We have indicated elsewhere that for the military establishment the law determining mental responsibility is not an open question. United States v. Kunak, 5 USCMA——, 17 CMR——. In the Federal civilian system Congress has legislated on certain procedural matters having to do with insanity. 18 USC §§4241-8; DC Code (1951), § 24-301. However, no such legislation has been forthcoming to govern the field of military law. Moreover, the Secretaries of the several Armed Forces have long been empowered to commit "insane persons," and to retain them in medical custody so long as mental disorder persists. 24 USC § 191; White v. Treibly, 19 F. 2d 712 (CA DC Cir.); Overholser v. Treibly, 147 F. 2d 705, cert. denied, 326 US 730. The grant of this power to a Federal executive branch is indeed unique. Cf. Wells v. Attorney-General of the United States, 201 F. 2d 556 (CA 10th Cir.); Higgins v. United States, 205 F. 2d 650 (CA 9th Cir.); cert. dismissed 346 US 870.

The authority to determine who shall be committed as insane should in practice be linked with the determination of who shall be acquitted as mentally irresponsible—since in the ordinary case, a person properly acquitted by reason of insanity requires treatment in a mental institution. Yet, unless commitment procedures are integrated with the administration of criminal law, there is more than a fair risk that an accused may avoid both the jail and the asylum. Naturally, integration of these procedures can best be achieved by providing that the rules concerning commitment on the one hand, and criminal irresponsibility, on the other, issue from the same source. Since Congress has expressly entrusted the determination and administration of commitment procedures to the executive branch—of course, with review of its action through habeas corpus—we find no anomaly in concluding that Congress may also have acquiesced in the formulation by the Chief Executive of standards for determining sanity in trials by court-martial.

90 However this may be, were the question an open one in this Court—which it is not—we would be hesitant at the present time in adopting for the military establishment the approach of the Durham case. It seems appropriate to supplement our opinion in United States v. Kunak, supra, by noting there some of the reasons

for this hesitancy. In the first place, we are—it must be confessed—somewhat troubled by the uncertainty of the criterion set down in Durham to the effect that, to be exculpable, a criminal act must be the "*product*" of mental abnormality. Indeed, there may be some controversy concerning the scientific validity of the premise that a criminal act may be committed which is *not*, in some sense, a product of whatever mental abnormality may exist. Would not the presence of any abnormality operate to create reasonable doubt in the accused's favor if there is aught to the view—constantly reiterated by psychiatrists—to the effect that human personality may not properly be compartmentalized, and that the McNaughten Rules erred in assuming the possibility of monomanias?[7]

Another possible difficulty is that—under Durham as presently developed—the members of a court-martial would be afforded no guidance in determining when mental disease exonerates since causation is so broad a concept. Naturally predictability is diminished when results are made to hinge almost entirely on
91 the views of causation entertained by the particular court which tries the accused.[8] Instead of a situation resulting in

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[7] E. g., Dr. Overholser states: "The old concept of 'monomania,' in which a delusion is found without other mental involvement, is not today accepted by psychiatrists, although the word and concept seem to die hard in the law!" Overholser, The Psychiatrist and the Law, 1953, page 63. See also, Weihofen, supra, pages 109-11. Accordingly, a cut-and-dried rule has been advocated by some, "namely that criminal responsibility in such cases should depend simply upon the presence or absence of a clinically recognizable major mental disorder (psychosis) or gross mental deficiency (imbecility or idiocy) at the time the crime was committed" Weihofen, supra, page 116. Cf. Report of Royal Commission on Capital Punishment, Appendix 9, paragraph 12(f) (law in Norway), (hereafter cited Royal Commission Report); MacNiven, Psychoses and Criminal Responsibility, Mental Abnormality and Crime, 1944, page 60; TB MED 201, paragraph 4*b*(3). Another commentator, however requires a *relationship* between the psychological disorder and the crime to be established, and relates: "Thus a patient of mine who heard imaginary voices, broke into and entered a shop, but he did not do so because of the promptings of his imaginary voices, but on account of the promptings of some very real and very undesirable associates." Neustatter, Psychological Disorder and Crime, 1953, page 12.

[8] Predictability of the result facilitates the disposition of the charges prior to hearing in such a way that the expense and travail of a trial may be avoided. If, however, the matter is to be placed in the jury's lap without guidance to its members, consistency would

an equal and uniform application of the law, we might well find one in which an accused's fate would hinge on his financial ability to secure the services of glib counsel and to hire persuasive expert witnesses. Also, is the testifying psychiatrist to be permitted to furnish a medical diagnosis only—with little correlation to the central inquiry before the court—or may he also answer the crucial question of whether the accused's act was "caused" by a mental abnormality?

The comment has been voiced that—realistically considered—the "certainty" of today's rules is wholly illusory in any case—since, in its determination of the question of sanity, a jury tends to follow not the law as enunciated by the trial judge, but rather the dictates of its members' sympathy or want of sympathy with the accused person before it. And it is added in hortatory vein that the law should fall into step—and must discard its effort to limit the jury through the use of narrow tests like those of the McNaughten Rules. We are sure that the anarchy, thus assumed to exist in the jury's processes, is not so widespread as the exponents of this argument would have us believe.[9] Indeed, in many instances the juror,
92 or other trier of fact, may be grateful for the legal rule which serves to aid him in the determination of a difficult question.

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seem to demand that charges not be dismissed on grounds of irresponsibilty without trial—for the reason that this action would invade the jury's province.

With reference to predictability, it is to be observed that Judge Frank has suggested that the craving for certainty in the law reflects deeply-embedded irrational drives. See e. g., Frank, Law and the Modern Mind, 1930, chapters I, II. Regardless of whether this be true, it seems clear that unpredictability of legal consequences does not generally enhance respect for and confidence in the law—qualities which are highly desirable. Moreover, this unpredictability may serve to encourage frivolous, dilatory defenses, or to provide an added incentive to gamble on crime in the first instance.

[9] Some weight, too, must be given to the effect of rules of law in shaping psychiatric testimony. For example, a psychopath cannot in military law qualify for exculpation by reason of irresponsibility, for the reason that he is not deemed to possess a mental *defect, disease, or derangement*. A psychiatrist who is aware of this legal construction of the term "mental defect, disease, or derangement" could not, therefore, conscientiously link a diagnosis of psychopathy with a conclusion of irresponsibility. Presumably his testimony, if he is called as an expert witness, would reflect this circumstance. We would surmise that, in turn, the finding of the court-martial would ultimately mirror the original clinical diagnosis and the ensuing testimony.

and thus removes in some measure the strain of moral decision on his part.[10] Furthermore, the argument is self-defeating, for, if instructions on sanity are of no avail in any event, then appellate courts need not concern themselves with the review thereof—and surely should not predicate reversal on supposed errors in their language.

Whatever the vagueness of the Durham rule in its present stage of elaboration, it might have little practical significance if the test laid down were combined with an insistence on a differentiation between mental defect, disease or derangement, on the one hand, and character and behavior disorders, on the other. We are somewhat unsure of what the Court of Appeals intends in this particular. The opinion in Durham refers to criminal acts caused by mental disease or defect, but no sort of effort is made to juxtapose these against character or behavior disorders. Indeed, it appears that the definitions there of mental disease and defect are pointed principally toward settling a matter which is perhaps unclear under the strict wording of the McNaughten Rules—that is, that a *defect* of the mind, as well as a disease thereof, should serve to free from criminal responsibility. See Royal Commission Report, paragraph 335.

It may be suggested that the test of irresponsibility advanced in Durham is in part a response to the occasional criticism by psychiatrists that they have been forced in the courtroom to respond to questions which extend beyond their medical expertise.

93 Indeed, certain members of this profession seem at times to wish to do no more than present a medical diagnosis to the jury. In light of the esoteric nomenclature used in the field, and the hypertechnical divergence between various schools of psychiatric thought, as well as because of the complexity and sheer uncertainty of the area under exploration, it can readily be imagined what wholesale want of enlightenment would eventuate from *purely* medical testimony from the witness-psychiatrist.[11] In the unlikely

[10] Incidentally, a jury unbridled by legal definitions will not always benefit an accused. For instance, the members of a jury might—when confronted with a prognosis, for the accused of incurable insanity—return a conviction and death sentence with euthanasia in mind, or motivating them subconsciously. Cf. Royal Commission Minutes, Q 7395. Also, the jury might in certain cases be moved by fear. See, e. g., Overholser, supra, pages 59-60. The impersonality involved in letting the "law" make a decision on standards of irresponsibility may shield the juror from guilt feelings about his decision.

[11] The problem of communication is well treated by Dr. Davidson. See Psychiatrists in Administration of Criminal Justice, 45 J. Crim. Law 12 (1954).

event that the Court of Appeals intended this result, we fear that transplanting this view in the military establishment would render the court member's lot—like that of the policeman in the song—a distinctly unhappy one.

If, however, the medical witness is to be permitted to testify concerning the existence of "mental defect or disease," what criteria are to be furnished him in this regard? In military law as it presently exists, we find in the Joint Definitions of the Armed Forces, supra, a usefully detailed guide. And we inclined to believe that, under the law governing the military, the insanity defense usually falls—if fall it does—on the absence of "mental disease or defect." However, the psychiatric witness is wholly lacking in guidance of this nature under most civilian statutes. And there are few judges, we suspect, who would feel sufficiently qualified—or be daring enough—to instruct a witness, or a jury, as to whether the psychiatric diagnosis made amounted in a particular case to mental disease or defect under the law. Under the present administration of mental responsibility, the witness, or the jury, in the usual civilian court *does* possess the standard that the disease found to be present must be such as to deprive of ability to distinguish right from wrong—or, in jurisdictions where irresistible impulse is accepted, of ability to resist the impulse to do wrong. In light of those criteria of gravity, it is chiefly the psychotic who escapes punishment.

But what if every effort is abandoned to define that "mental disease or defect" which will free from criminal responsibility?

94 In this connection one might inquire into the question of what proportion of serious offenders are mentally normal. It has been argued, indeed, that in a real sense one cannot be deemed normal who lacks the conscience to abide by the laws of society. One legal author writes, for example, that "Psychologists, psychiatrists, and neurologists attribute all crime to mental disease." Dangel, Criminal Law, 1951, § 128, n. 44, page 234.[12] While this statement

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[12] Such a view was perhaps implicit in the words of one medical writer: "From the psychiatric point of view, therefore, the criminal as such has ceased to exist." White, Insanity and the Criminal Law, 1923, page 26. Cf. Glueck, Changing Concepts in Forensic Psychiatry, 45 J. Crim. Law 123 (1954); Neustatter, supra, page 11. Royal Commission Minutes, page 462, paragraph 21; also Qs 6395-6. Something like this point of view was recently put, in exaggerated form and ironically, by a British writer, himself neither a psychiatrist nor a lawyer: "In the new Britain which we are building, there are no criminals. There are only the victims of inadequate social service." Evalyn Waugh, Tactical Exercise. The negligible impact

constitutes an exaggeration, of course, even the medical profession will agree, we suspect, that the tendency of at least some psychiatrists to attribute crime to mental disease is frequently enhanced—doubtless unconsciously—when they are retained as defense witnesses in a criminal case. Cf. White, Insanity and the Criminal Law, 1923, chapter V.[13]

95 Those who believe that every crime reflects the existence of mental disorder render the notion of disease meaningless.

of such an approach on a jury is suggested by the following testimony of Lord Cooper:

> ". . . The case of *Braithwaite* was peculiar, at least to me, because of the fact that there was evidence of an expert that every criminal was suffering from diminished responsibility and should be treated as such—the extreme view which Dr. Slater will be familiar with. The jury objected to that view and found the man guilty of murder, and I sentenced him to death." [Royal Commission Minutes, Q 5521.]

Of interest in the same connection is the following passage from the cross-examination of a Dr. Grierson, a Prison Medical Officer, called by the Crown as a witness in the Trial of Neville Heath: Q: "And the man who did that sort of thing [sadistically killed a young lady] must have been a most abnormal sort of man?" A: "Yes. I have never yet said that any murderer is normal." See Critchley, The Trial of Neville George Clevely Heath, 1951, pages 29, 179. A Dr. Hubert, prominent psychiatrist, testified for the defense in that case to the effect that Heath suffered from "moral insanity," and therefore should be exculpated under the McNaughten Rules, since he did not, in one sense, "know" that society considered his acts wrong. The cross-examination of the witness revealed strikingly some of the practical difficulties in so broad a conception of what "disease of the mind" should free from criminal accountability.

[13] Dr. White explains frankly that it would be expecting the impossible to anticipate that a witness would be completely devoid of partisanship. In The Show of Violence, 1949, Dr. Wertham, a well-known psychiatrist, hints at the partisanship of the expert, and jokingly comments on testimony in the celebrated Robert Irwin case:

> "Physicians of the utmost fame
> Were called in turn, and when they came
> They answered as they took their fees
> There is no cure for this disease."

[See pages 151, 158-9.]

insofar as mental responsibility is concerned.[14] While their conclusion may accord with the premises of determinism, it scarcely squares with the assumptions of free will and culpability which underlie our penal legislation. Indeed, many psychiatrists will recognize the justice of this criticism and insist that—in even so serious crime as murder—the accused may be suffering from no sort of mental disease, and will point out as well that there are valid clinical criteria for distinguishing the diseased from the "normal" criminal.[15] Perhaps this is true despite the existence of ill-defined "wastebasket" categories like that of psychopathy.[16]

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[14] On this premise sanity would be an issue in every case of greater gravity than a traffic offense. Presumably the judge, or in courts-martial the law officer, would then in every case be required to instruct on the possibility of an insanity verdict or finding—and a plea of guilty would be impossible. See United States v. Burns, 2 USCMA 400, 9 CMR 30; United States v. Trede, 2 USCMA 581, 10 CMR 79.

[15] See Royal Commission Report, paragraphs 393-402; cf. Royal Commission Minutes, Qs 2548-51. Cf. Henderson, Psychopathic Constitution and Criminal Behavior, Mental Abnormality and Crime, 1944, pages 106, 110.

[16] See Royal Commission Report, paragraphs 393-4; Weihofen, supra, pages 22-31; Overholser, supra, pages 34-5; Royal Commission Minutes, Q 2509. The Royal Commission also comments: "[M]any of the adherents of the psychoanalytic school would not recognise the fundamental distinction and would regard psychopathic personality as a form of mental disease." Paragraph 395. In many instances, the designation "psycopath" when applied to an individual signifies: "first, that the person is not insane, neurotic or mentally defective; and secondly, that he has an abnormal character and temperament." Paragraph 396. "A psychopathic criminal may be regarded as a person with a lasting tendency to come into conflict with the law, owing to defects of temperament and character of a persistent kind, who is not suffering from any recognisable mental disease and could not be dealt with under the Lunacy Act." Paragraph 397. With particular reference to the evidence in the record before us, it is interesting to note the following description given the Royal Commission of the aggressive psycopath: "'The diagnosis is made on persons of habitual abnormal behaviour, behaviour which has been abnormal from childhood; and the disorder of behaviour is seen in abnormal emotional reactivity,' so that the individual who has it shows *abnormal outbursts of temper, outbursts of impulsive violence, outbursts of alcoholic excesses often repeated, of suicide attempts and in some cases of homicidal attempts.*'" Paragraph 398.

However, we are inclined to doubt that these distinctions
96 between the mentally normal and the diseased criminal will be readily explicable to juries if the law provides no criteria—or that, if understood, they will be uniformly applied.

In this connection it should be mentioned that the criticism of the law made by numerous psychiatrists fails to take account of the framework in which a decision as to criminal responsibility must be accomplished. For one thing, it must be reached by laymen, quite unversed in psychiatric terminology, and to whom the expert witness must communicate.[17] For another, the adversary system, the excitement of the courtroom, and the rules of evidence do not always conduce to the same decision which might be arrived at by doctors in calm consultation.[18] Further, it has been argued that the physician is in a position—consciously recognized or no—to profit because of a particular diagnosis. And unlike the normal medical situation, an erroneous diagnosis may not carry untoward consequences for the subject's health. Certainly the diagnosis must be made in an area of great complexity, where a theory may readily be found to sustain virtually any position, and where the possibility of a subsequent establishment of error is infinitesimal—since the witness does not, and necessarily cannot, vouch for a later response under treatment. This delineation of difficulties associated with psychiatric testimony in the courtroom shows why the determination of responsibility for *legal* purposes—and there is no *medical* one to which "responsibility" would ever be relevant—may involve policies,
and a need for general rules, which might be inappropriate
97 were the procedure for determining responsibility otherwise. Of course, our concept of public trial does not permit

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[17] The significance of communication by the psychiatric witness to the trier of the facts cannot be overemphasized. One criterion for appraising a legal test of mental responsibility must be whether the test lends itself to communication with the jury. Naturally enough this is impossible if the test is phrased in terms which have no meaning for the individual juror within the framework of his own experience. Perhaps one reason for the stability of the McNaughten Rules is that an inability to know right from wrong is a concept that has some meaning for the layman—even though by the psychiatrist it is viewed to constitute an unbalanced focus on one facet of personality.

[18] It is noteworthy, indeed, that one prominent forensic psychiatrist has recently gone on record as favoring the hypothetical question. See Davidson, Psychiatrists in Administration of Criminal Justice, 45 J Crim Law 12, 16-7 (1954).

substantial alteration in the basic procedure for the establishment of responsibility.

We must concede that the liberalization of the criteria of mental irresponsibility accords with certain penological concepts to the effect that criminals should be "treated" and not "punished"—for liberalization will necessarily augment the number who will escape "punishment." Unfortunately this policy of "treatment" may not have even complete medical validity—although it may be expected to keep overworked psychiatrists even busier than they are at present. It is not at all certain, we believe, that punishment lacks therapeutic value in many cases. Neustatter, Psychological Disorder and Crime, 1953, page 232; Royal Commission Minutes, Qs 6981-3, 7400-1. Moreover, it is even clearer that—at least in our present state of knowledge—certain types of abnormality often resulting in criminal offenses cannot be "treated" with success. For instance, the expert witnesses before the Royal Commission were highly doubtful that the psychopath could ever be the subject of cure.[19]

Additionally, there are significant factors to be considered quite apart from the rehabilitation of the offender—the goal on which psychiatry, not unnaturally, seems centered. One of these is the deterrence of others by the infliction of punishment, and another the overt manifestation of society's distaste for the act punished. Also, an excessive focus on "treatment," and on criminal behavior as an illness, provides a socially-approved and convenient rationalization or any sort of illicit desire which may cross the mind. Put differently, it provides a convenient role into which the criminal may fit. Cf. Cressey, The Differential Association Theory and Compulsive Crimes, 45 J Crim Law 29 (1954). Then, too, contradiction of the fundamental penological premise of "free will" occurs, which premise—whether or not demonstrable philosophically—seems a pragmatically required assumption, and one that underlies our institutions—beginning, shall we say, with the punishment of the child by his parents.[20]

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[19] Royal Commission Report, paragraph 402. The Commission recommended the establishment of special institutions for psychopaths, a measure which already has been adopted in some European countries. Paragraphs 402, 658-671.

[20] In connection with punishment it is sometimes urged that its value as a deterrent is overrated. For instance, during states of heightened mental tension certain types of individuals may be virtually undeterrable. See, e.g., Royal Commission Minutes, pages 492, 493, 545-6, also Qs 4217-8. The deterrent effects of punishment may, however, be more subtle in operation. For instance, punishment may form a vehicle for upholding an identi-

Regardless of whether the accused offender is to be "punished," there seems little doubt that society should do *something* about him, and should not free him without treatment in lieu of penal action. In England, an accused who is found to have been insane at the time of the commission of the offense charged is consigned immediately to an institution for the criminally insane—and there he remains for such time as the executive authorities consider wise. Neither is the way of the malingerer smooth, for he cannot promptly "recover" his sanity and seek his freedom. Indeed, we are informed that, if the English authorities become convinced of malingering by one found insane by a jury, the inmate will simply be retained in a mental institution for the period he would probably have served in prison by way of sentence. Since the prospects for early release from an asylum are dismal for an accused who is found insane at the time of the offense, and because mental irresponsibility must be pleaded in England,[21] only rarely does an accused find it worth while to make use of the plea, save in capital cases—especially in trials for murder, for which the death sentence is mandatory. Royal Commission Report, paragraph 297. Under these circumstances it is understandable that the Royal Commission should feel no fear that a proliferation of insanity pleas would follow upon a liberalization of the McNaughten Rules.

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In the District of Columbia commitment would also follow automatically upon an acquittal by reason of insanity. See, DC Code, supra, § 24-301; United States v. Durham, supra, fn. 57.

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fication between the State, as the large-scale dispenser of law and punishment, and the father, who within the family generally performs a similar authoritarian function. This identification may redound to the support of the State through the operation of attitudes acquired in childhood. Also, punishment is a graphic manifestation of group disapproval of conduct which harms the group; and this disapproval may ultimately be internalized in conscience. Perhaps too, punishment siphons off in a socially acceptable form some of the hostilities, both conscious and unconscious, which might otherwise disrupt society. Under this last analysis some may conceive of punishment as involving a symbolic sacrifice of the offender to society—through which sacrifice tensions are allayed. See also Royal Commission Minutes, Q 7395. The point here is that it is not for this Court to attempt a sweeping revision of so complex a field as penology.

[21] In military law no formal plea is required to raise the issue of insanity, and a suggestion for inquiry into sanity may properly be forthcoming from any one of numerous sources. Manual for Courts-Martial, United States, 1951, paragraph 122*b*.

However, the road to subsequent release in the District or in other American jurisdictions where an accused is automatically committed to an asylum following an acquittal by reason of insanity would probably be much easier than in England. Indeed, a vexing problem in this country has to do with the accused person sufficiently eccentric to exhibit a convincing insanity defense, yet "sane" enough to obtain release on habeas corpus. See United States v. Biesak, 3 USCMA 714, 14 CMR 132. This danger would appear especially great as to the various so-called psychopathic types. These individuals give many manifestations of mental normality—often enough to obtain release following a sanity hearing. See Cleckley, Mask of Sanity, 2d ed.[22] Also, as is revealed clearly in the testimony before the Royal Commission, they raise difficult problems in mental institutions, and interfere to a marked extent with the therapy of other patients who, unlike the psychopath, may be successfully treated. Cf. Royal Commission Minutes, Q 4381. Many witnesses before the Commission considered that separate institutions should be established for the custody of such persons. Understandably enough, therefore, the superintendent of a mental institution under present conditions possesses a prompting—conscious or unconscious—to release these patients and thus to make available increased facilities for the handling of others whose condition is improv-
100 able. As matters now stand, it is not at all unreasonable to suppose that the goal of retaining the psychopath—and like offender—in some form of custody will be furthered by viewing him as criminally responsible, rather than the converse.[23]

If the termination of commitment is comparatively easy to accomplish, and if the rules of mental responsibility are liberal, it is obvious that the premium on malingering is enhanced. Of course, many psychiatrists urge that this danger is exaggerated, and that the malingerer may readily be detected by competent

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[22] As it was put to the Royal Commission, psychopaths "are in the most deplorable of all conditions, not sane enough to be at large and not insane enough (in terms of certifiability) to be suitable for Bedlam." Royal Commission Report, paragraph 398. See also White, Insanity and the Criminal Law, 1923, pages 107-27, for other instances of accused persons who managed to evade in the long run both commitment and confinement.

[23] "For the present we must accept the view that there is no qualitative distinction, but only a quantitative one, between the normal average individual and the psychopath, and the law must therefore continue to regard the psychopath as criminally responsible." Royal Commission Report, paragraph 401.

examiners. Several observations seem proper in this connection. In the first place, will not the difficulty of shamming insanity vary, in some measure at least, with the degree of mental illness which must be feigned for a defense purpose? To put the matter in another fashion, will not a feigned *psychosis* be more easily detectible by a trained psychiatrist than some *lesser* mental ailment which is equally sham.[24] Yet if the lesser disturbance will constitute a defense to crime, it is undeniable that there will be an incentive to plead its existence. Moreover, the possibility of detecting the malingerer will vary greatly with the availability of trained psychiatrists and the provision of facilities for observation of the accused by a competent examiner.

[10] Against the background of the foregoing discussion several observations may be made which tend to demonstrate the need for a cautious approach in the military establishment to the liberalization of the criteria for mental responsibility. For one thing, the services of psychiatrists, and the presence of facilities for psychiatric procedures to unCloak the malingerer, may not be readily available in many areas in which courts-martial must function. Thus, feigned mental illness may enjoy better odds of escaping detection. Secondly, the premium on a resort to insanity as a defense is higher in the military establishment than is virtually any other system of law. No more than a reasonable doubt

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[24] Some criminals may be sufficiently abnormal mentally as to have a distinct lead in feigning whatever degree of disorder is necessary for acquittal. Cf. Royal Commission Minutes, Qs 6031-3. More important, while the psychiatrist may be adept in discovering the conscious malingerer, how easily can he detect the etiology of symptoms of abnormality which are not products of the conscious mind. For example, it is known that in certain individuals, physical ailments—often termed psychosomatic—may be developed to satisfy an unconscious desire—such as a craving for attention or sympathy. Similarly amnesia may involve the repression of distasteful memories. See United States v. Olvera, 4 USCMA 134, 15 CMR 134. If a successful insanity defense is rendered too easy of accomplishment, will not one accused of crime develop symptoms of mental abnormality—although the development will be unconscious rather than conscious? In short, when society puts too high a premium on mental illness, will not such sickness be sought both consciously *and* subconsciously? We doubt that the psychiatrist will be so successful in detecting mental abnormality developed *after* an offense as a variety of subconscious defense mechanism, but not as a form of conscious malingering. In re malingering, see also Neustatter, supra, pages 181-4; Wertham, supra, pages 41-61.

of sanity is required for acquittal. Then, too, commitment does not follow automatically on findings of not guilty by reason of insanity. TM 8-240, AFM 160-42, paragraph 7. In such a case, in fact, the findings of the court-martial are not required to state any sort of conclusion as to mental condition at the time of the offense. As previously noted, the Secretary of the Department concerned may order the commitment "until they are cured" of "insane persons belonging to" that Department. 24 USC § 191. For the Army, the pertinent directive appears to be SR 600-440-1, dated June 7, 1949, and entitled "Disposition of Psychotics." It is unclear whether 24 USC § 191 was intended to be applied to the "psychotic" only; in fact, at the time the statute was enacted, that term may not have been in vogue. Too, in practical operation the Army's SR 600-440-1 may not be limited to "psychotics," as distinguished from other sufferers from mental illness. In any event, the provisions in that Regulation for the disposition of insane persons indicate that the Army, quite understandably, does not propose to undertake extended custody of mentally irresponsible military personnel—although its power to do so has been judicially upheld under some circumstances. White v. Treibly, supra; Overholser v. Treibly, supra. This policy of self-limitation conforms to the general unwillingness to encourage widespread Federal activity in the handling of mentally disordered persons. Wells v. Attorney General of the United States, supra; Higgins v. United States, supra.

102 Consequently the risk that a successful malingerer, or a borderline case of mental disorder, will be released from a Federal mental institution is a comparatively good one. That he will be recommitted in turn by the authorities of a state is a possibility which will vary with the jurisdiction and the nature of the disorder. In the case of a civilian who is subject to military jurisdiction—within which category the present accused falls—the odds of escaping commitment to a mental institution, if acquitted by reason of insanity are especially favorable. We doubt that such a civilian would be considered a person "belonging to" the military establishment involved, within the meaning of 24 USC § 191. Moreover, and unlike a serviceman, Mrs. Smith could not be transferred to an appropriate agency of the Veterans' Administration for disposition and for the institution of commitment proceedings. SR 600-440-1, supra, paragraphs 5*a*, 6*a*, 8; cf. 38 USC, chapter 12A, Veterans' Regulation No. 10, section XIV. In fact, Federal authorities would apparently lack the power to hold her for any protracted period of time, save as directed by the sentence of a court-martial. In truth, the only prospect for her "treatment" would seem to lie either in voluntary commitment or in a decision by some state to accept her as its ward. Cf. SR 600-440-1, supra, paragraph 12*a*.

While the prospect of evading both confinement and long-term commitment would constitute one incentive for a serviceman to gamble on an insanity defense, there are others as well. These include, *inter alia*: (1) a probable exodus from the Armed Service concerned—a pleasing vista in many instances—plus (2) a type of discharge carrying little social stigma and ordinarily permitting the enjoyment of full veteran's benefits. The accused person facing court-martial has literally everything to gain and nothing to lose from an attempt at an insanity defense if he commits an act otherwise criminal.

Weighing these and others of the multiple factors operative in this area, this Court is unwilling at present to essay a liberalization of the current criteria of insanity in military law. Indeed, if we were to envisage a change in the present detailed military distinction between mental defect, disease, or derangement, on
103 the one hand, and character or behavior disorder, on the other, we would feel the need for special wariness. If, however, it is proposed simply to superimpose the Durham causation test on that differentiation, the impact would be of lesser force, and, perhaps—as experience accumulates—such a change may appear desirable, either to the President, the Congress, or this Court.

It may be pointed out, too, that military law reflects many mitigating features in its approach to insanity. One sentenced to confinement will necessarily be under careful scrutiny by prison officials to determine whether mental derangement exists, and in suitable cases may be transferred to a facility for the criminally insane maintained by the Federal Bureau of Prisons. See SR 600-440-1, supra, paragraph 9; 18 USC §§ 4241-8. The sentence to confinement will afford a legal basis for retaining a convicted accused in custody while psychotherapy takes place. For borderline types of mental cases, the form of custody—that is, whether accomplished in a penal or a mental institution—will be determined by the facilities available in each and by treatment prospects. These matters cannot be developed adequately at the trial of an accused, but they can be a subject for intelligent decision by military officials, or later by those of the Bureau of Prisons.

The Royal Commission was especially concerned with the possibility that, by reason of the strict operation of the McNaughten Rules a death sentence might be executed on one who is mentally diseased. Of course, this apprehension centered on the English Rule providing that the death sentence is mandatory in murder cases. In the military establishment, however, a mandatory death sentence is not imposed for murder. See Article 118. Moreover, as to premeditation the doctrine of partial responsibility—to be discussed hereafter—applies, and thereby a finding of guilt may be

limited to one of unpremeditated murder. Furthermore, in a court-martial there is at all times a ready reception—prior to sentence—of evidence of mental impairment or deficiency of any type, even that which falls short of showing irresponsibility. Manual for Courts-Martial, supra, paragraph 123. Thus, despite
104 the stigma of conviction, which still exists for the person convicted of murder under the traditional rules governing mental responsibility—but who might conceivably be acquitted under the approach adopted for the District of Columbia—we are inclined to believe that other and more compelling considerations argue against accepting the more liberal view until further and broader experience is acquired. Cf. Royal Commission Minutes, Qs 7062-5.

V

Defense counsel have also contended on appeal that, although the Manual provides the desiderata for the determination of mental responsibility, Mrs. Smith was prejudiced because of the role played at her trial by "Psychiatry in Military Law," an Army Technical Manual, TM 8-240, dated September 20, 1950. This latter publication is a joint product of the Army and Air Force,[25] which, for the Army, superseded a Technical Bulletin dating from October 1, 1945, TB MED 201. It, in turn, was revised in May 1953. It is the defense's view that TM 8-240 prescribes standards of mental responsibility in addition to, and in some respects different from, those set forth in the Manual for Courts-Martial. They argue further that the Secretary of the Army is without authority to tighten or otherwise to modify the rules governing in this area. Actually the power given the Secretary of the Army by Congress to commit an insane person "belonging to" the Army might well be taken to mean that this official—as well as his superior, the President—does possess authority to *prescribe* rules governing mental responsibility. However, in view of the exercise of the President's authority in this area, and the overriding purpose of uniformity among the Armed Services, we must agree with the defense that the Secretary of the Army does not enjoy rule-making power in this sphere.

Yet this conclusion is inapplicable in the present instance. After a careful examination of TM 8-240, as well as its predecessor, we are convinced that there was no purpose on the part of the Secretary to promulgate *new* rules of military law, but rather
105 only to interpret for the benefit of service psychiatrists the *existing* ones.[26] Also, the Technical Manual supplies infor-

[25] AFM 160-42.

[26] The opening sentence of TM 8-240 announces:

"This manual defines and explains the legal standards applied in military law to determine whether a person was

mation highly useful to the military psychiatrist who will probably be called to testify at trials by court-martial. There is certainly nothing in this construction inconsistent with the function of Technical Manuals which according to the applicable Army directive are designed to

> "... supplement Field Manuals by providing detailed treatment of specific subjects considered necessary for the full accomplishment of required training. They also contain descriptions of materiel and instructions for the operation, handling, and maintenance and repairs thereof, information and instructions on technical procedures, exclusive of those of an administrative nature." [AR 310-20, paragraph 22, dated August 11, 1952.]

We are sure that this technical publication is entitled to "some weight" as an official interpretation of the standards set out in the Manual for Courts-Martial. Indeed this Court has on occasion cited TM 8-240—both in its aspect as an official interpretation of the Manual for Courts-Martial, and as a repository of scientific knowledge compiled by the Surgeons General of the Army and the Air Force. See United States v. Trede, 2 USCMA 581, 10 CMR 79; United States v. Olvera, 4 USCMA 134, 15 CMR 134. However, we have never held—or believed—that the Technical Manual in question was of itself in any way binding on
106 this Court, nor intended to be controlling on either a court-martial or an expert witness.

Of special relevance in the trial of the present cause is paragraph 13*a* of TM 8-240, which emphasizes that a "character or behavior" disorder does not operate to remove an accused's criminal account-

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mentally responsible at the time of an offense and has the requisite mental capacity to be tried by court-martial." [Paragraph 1.]

Unfortunately the wording of this Manual is more peremptory than that used in FB MED 201, its predecessor. Surveying the Technical Manual as a whole, however, we do not think that it seeks to do more than explain existing rules. When those rules are identical with those promulgated in the Manual for Courts-Martial, whatever force they possess arises from their original source, rather than their inclusion in TM 8-240. It may be added that, in light of the presumption of lawfulness attaching to official acts, we are little inclined to assume that the Secretaries of the Army and the Air Force sought to arrogate to their Departments an authority in defining insanity which had previously been exercised by the President, and quite probably was intended by Congress to remain with the President.

ability. Accordingly, in its discussion of the notion of "irresistible impulse," the publication states that such a prompting constitutes no defense if it springs from a "character or behavior" disorder — and the latter principle was quoted approvingly by us in United States v. Trede, supra. The draftsmen of the 1950 Technical Manual appeared to consider that their pronouncements were implicit in the demarcation established in the 1949 Manual for Courts-Martial between "mental disease, defect, or derangement," on the one hand, and a "defect of character, will power, or behavior," on the other. Manual for Courts-Martial, U. S. Army, 1949, paragraph 110*b*. The correctness of this assumption seems *confined* by a repetition in the 1951 Manual for Courts-Martial of the verbiage used in this connection in the 1949 edition. See Manual for Courts-Martial, United States, 1951, paragraph 120*b*. Moreover the framers of the latter source — far from being unaware of the exposition presented in TM 8-240 — observe that the publication "contains a very good discussion of the whole subject of insanity in the sense we are using the term," and add "This pamphlet will guide both military lawyers and military psychiatrists along the lines of the approved doctrines." Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 167.

The Technical Manual also conforms to the Joint Armed Forces Definitions of Psychiatric Conditions. The former source's interpretation of "defect of character, will power, or behavior" runs to the effect that "pathologic personality, constitutional psychopathy, psychopathic personality" and the like do not exempt from criminal responsibility. TM 8-240, paragraph 13*a*. The predecessor of TM 8-240 also observed that although "psychopaths are the group of psychiatric cases about whose mental accountability lawyers and psychiatrists have their chief disagreements," "psychopaths are generally held to be responsible for their acts," TB MED 201, supra, paragraph 4*d*. The Joint Armed Forces Definitions make clear that the generic group mentioned — that is, "character and behavior disorders" — includes those which theretofore had been termed "pathological personality" types, as well as types previously viewed as suffering from a "constitutional psychopathic state," or a "psychopathic personality." See SR 40-1025-2, paragraph 6.

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In discussing "irresistible impulse," TM 8-240 sets forth what has been referred to as the "policeman at the elbow" test. Paragraphs 5*a*, *c*. Under this test no irresistible impulse is present unless the offense would have been committed had a policeman been present at the time. According to appellate defense counsel, a too narrow test of irresistible impulse is thus provided. Moreover, they contend that the "policeman" test has been altered subsequently by the Army and Air Force. This claim derives from the fact that, in the

May 1953 edition of TM 8-240, the test for irresistible impulse is phrased in these terms: whether "the compulsion generating the illness was so strong that the act would have been committed even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed." Paragraph 5*a*.

In light of our premise that the Secretaries of the Army and the Air Force may not alter the criteria of insanity set down by the President in the Manual for Courts-Martial and are without power to promulgate new rules for the determination of mental responsibility, we have searchingly examined the so-called "policeman" test. Perhaps the test originated in a remark by Lord Bramwell. See United States v. Kunak, supra. See also Royal Commission Report, paragraph 292. Even in jurisdictions applying only the McNaughten Rules—with their focus on knowledge of the act's wrongfulness—the effect of a hypothetical policeman at the elbow has been a frequent subject of inquiry. One well-known psychiatrist—apparently with considerable experience in forensic psychiatry in a McNaughten jurisdiction—writes of the question as "old as the hills but ever new: 'Would he have committed the crime if a policeman had been present?'" Wertham, The Show of Violence, 1949, page 155.[27] A legal commentator, too, seems to accept this as the test for irresistible impulse. Burdick, The Law of Crime, 1946, paragraph 243*b*. See also, Davidson, Forensic Psychiatry, 1952, page 13. But see Royal Commission Report, paragraph 319.

The Manual for Courts-Martial emphasizes that "to constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also *completely* deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged."[28] Paragraph 120*b*. (Emphasis supplied.) Thus, mere *impairment* of the ability to adhere to the right does not constitute a defense, although it may form a mitigating circumstance. Paragraphs 120, 123. The emphasis on *complete* inability to adhere to the right renders it difficult to

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[27] Dr. Wertham was apparently referring chiefly to his experience in New York, a jurisdiction where irresistible impulse, as such, is not recognized as a defense—and where the question quoted by him was asked to probe into whether the accused could really distinguish between right and wrong at the time of the offense. Of course, it has been contended that a true irresistible impulse cannot coexist with full ability to distinguish right from wrong. See Hall, General Principles of Criminal Law, 1947, chapter 14; Weihofen, supra, page 96. In practice, in England there is some tendency to strain the McNaughten Rules so as to encompass this point of view. Royal Commission Report, paragraphs 227-8, 232-43, 270.

deem mentally irresponsible an accused person who would not have performed the act had there been an appreciable likelihood that he would be arrested and punished. Also, the fact that the Secretaries of the Army and Air Force considered this a correct exposition of the 1951 Manual for Courts-Martial and of the previous 1949 Manual which contained like wording is a persuasive circumstance.

We must concede that our willingness to accept a construction of complete inability to adhere to the right, focused on a hypothetical reaction to the prospect of detection, is heightened by the absence of any sort of suggested alternative interpretation.

109 It may be replied, of course, that the Manual's draftsmen did not intend that this "complete inability to adhere to the right" should possess a fixed meaning. If this be so, then the framers were redundant—for they would not have been required to include the additional test of ability to distinguish right from wrong. We doubt that one could be unable to distinguish right from wrong and at the same time able to adhere to that unrecognized right—although the converse could, of course, be true. Accordingly, we suspect that some refinement of the test of inability to adhere to the right was envisaged, and that there was no sort of purpose to leave it as an amorphous concept, which would in effect equate to the causation test laid down in the Durham case—and thus render the "knowledge of right and wrong" test superfluous.

Still another prop for an interpretation based on the effect of probable apprehension is derivable from one of the arguments used to support a greater liberalization of mental responsibility criteria. That argument runs to the effect that the usual jury may be expected to disregard limiting instructions from the judge, and to act as its members see fit in dealing with an insanity problem. If this premise is to be accepted, then one may inquire what finding a jury would be likely to return respecting the sanity of an accused who, it was established, knew right from wrong with reference to the offense charged and would have done the "right" thing, if he had anticipated detection and apprehension. We surmise that in virtually every such instance the jury would find sanity to exist. The point we are seeking to make is that such an individual as the accused in the imagined case shares qualities so characteristic of one thought of as "normal" that most laymen would—in the most catch-as-catch-can fashion—regard him as mentally responsible. And perhaps there is a certain amount of validity to this approach even for the psychiatrist: His body of learning tells us that monomania is a chimera, and that mental disease colors all aspects of personality, albeit with varying degrees of subtlety. The implicit converse, of course, would be that a "normalcy" in one sphere of per-

110 sonality would suggest normalcy in others. In short, a recognition by an accused that the law condemns certain activities, plus a willingness to obey the legal mandate when punishment is

in prospect betokens such a degree of normalcy as to require that he receive the punishment meted out to the "normal" criminal.

Moreover, there is a sufficient indicium of "normalcy" such as to suggest that punishment might have a therapeutic effect on the future behavior of the individual concerned. On the other hand, if psychiatrists testify that the accused would have done the questioned act despite the presence of a high risk of apprehension, the accused has given an indication that he is impervious to the penal sanctions of society—and thus it may be thought less probable that he would alter his behavior by reason of any punishment he may receive.

Furthermore, in establishing the criteria for mental responsibility, the military establishment must reckon with the widespread skepticism concerning irresistible impulse—especially in connection with serious offenses. For instance, Dr. Wertham comments that "There is with one exception no symptom in the whole field of psychopathology that would correspond to a really ungovernable or uncontrollable impulse. That exception is an obsessive—compulsive neurosis." He then asserts that "[C]ompulsions play no role in criminal acts," and therefore concludes that "It is therefore always bad psychopathology to speak of a compulsive murder or a compulsive suicide." The Show of Violence, supra, pages 13-4. Dr. Hopwood, the Superintendent of Broadmoor, expressed doubts with respect to the frequency of irresistible impulses associated with obsessive-compulsive psychoneurosis which produce anything beyond minor crime—although he conceded that "early schizophrenia may lead to an irresistible impulse, which may be one of the first overt signs of the disease." Royal Commission Minutes, Qs 4291-3. Cf. Royal Commission Minutes, Qs 3826-7. Dr. Yellowlees stated that "An irresistible impulse, in my judgment, does not occur except in the case of a person who has not known the nature and quality of his acts for several years." Royal Commission Minutes, Q 7354. But cf. Royal Commission Minutes, Q 2335. Sir Norwood East disputed especially the occurrence of cases involving "an irresistible impulse, apart from any other indication of mental disorder." Royal Commission Minutes, page 511, paragraph (24), Q 7033. Cf. Qs 2338-4264. See also Royal Commission Report, paragraph 270. Cf. Neustatter, Psychological Disorder and Crime, page 12.

With such skepticism prevalent among psychiatrists, it is understandable that public opinion would scarcely rally round a wholesale exculpation of "abnormal" persons by a widely-extended application of irresistible impulse. The witnesses before the Royal Commission attached weight to public opinion in connection with problems of penology—although they emphasized that in some areas it might be desirable to undertake attempts to change those opinions. See Royal Commission Minutes, Qs 4194, 4551-2, 6999-7000, 7588-91.

Cf. Royal Commission Minutes, Qs 6388-9. Absent some indication of contrary intent on the part of the draftsmen of the Manual for Courts-Martial, we are content to follow the same approach.

We observe, too, that penal action is, among other things, designed for the therapy and control of the individual punished. If the accused would have performed the reprehended act despite the prospect of apprehension, an indicium exists that he is impervious to punishment, and that there is but dim probability that as to him it will achieve a valuable rehabilitative result. Conversely, the person who—according to psychiatric testimony—would have been deterred from the act by the likelihood of detection would appear to offer better prospects of improved conduct following the imposition of punishment. Cf. Neustatter, Psychological Disorder and Crime, 1953, pages 230-1. The test voiced by TM 8-240 conforms to this differentiation.

It may then be asked whether this Court views as correct the test stated in the 1950 edition, or that found in the 1953 version, of TM 8-240. In the only important sense we deem each to be correct since, although differing somewhat in wording, they possess an identical core of meaning. That meaning simply has to do with whether the prospect of penal sanctions would have deterred the accused from the conduct in question—in short, whether punishment had significance for him as to that act. This is made clear in paragraph 5*c* of the 1950 Technical Manual, which states in explanation of the "policeman" test that "No impulse that can be resisted in the presence of a high risk of detection or apprehension is really very 'irresistible.'" Unfortunately the wording of paragraph 5*a* of that same document with respect to the "policeman" test might, if taken alone, be construed in a slightly different manner—a circumstance which doubtless produced the clearer phraseology of the later edition of the Technical Manual.[29]

The basic difficulty is that which may arise from a too literal application of the "policeman" test.[30] Perhaps, indeed, the accused

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[29] The framers of the Manual for Courts-Martial, United States, 1951, also realized that the "policeman" test should be applied with discrimination. See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 167.

[30] The "policeman" test literally applied may even err in favor of an accused in a rare type of situation—one, for example, where a policeman was in fact present at the time of the act but the accused did not anticipate apprehension. A situation of this sort has already reached this Court's attention. There the accused gave a so-called "bad check" with a policeman standing beside him; but the policeman did not realize that the check was bad—and so there was little risk of apprehension to deter the accused.

would not have committed the offense in the company of a
112 policeman, or of anyone else for that matter, for the plain reason that he wished to act in private—this despite the fact that he nonetheless knew he would be apprehended forthwith. Perhaps, too, he would not have attempted the deed with a policeman at his elbow, because he feared that the policeman would halt him prior to its completion. Cf Davidson, Forensic Psychiatry, supra, page 8; Neustatter, supra, page 97. Also, perhaps the presence of a policeman would have served to make more vivid to his mind the prospect of ultimate apprehension and punishment. And perhaps, finally, the presence of the policeman would have exercised some other symbolic effect in precluding or delaying the commission of the offense—quite apart from the probability of detection and punishment arising from his presence. Cf MacNiven, Psychoses and Criminal Responsibility, Mental Abnormality and Crime, 1944, page 53.

These possibilities appear to be somewhat theoretical. Yet psychiatrists on occasion are prone to draw distinctions difficult for lawyers and judges to comprehend. In light of these, it is distinctly possible that the "policeman" test—literally applied—may mislead. Therefore, the wording of the 1953 edition of TM 8-240 should be utilized as a guide for instructions and the like. Indeed, in a case in which it is clear that the trial was premised on an erroneous, overly literalistic construction of the "policeman" test, as phrased in the 1950 Technical Manual, we might well be compelled to reverse. On the other hand, in the absence of an overt showing that the test was construed to mean other than it does—namely whether the accused would have been deterred by a probability of apprehension and punishment—we are sure that reversal is not required. Compare United States v. Biesak, supra; United States v. Johnson, 3 USCMA 725, 14 CMR 143.

While dealing with the concept of "irresistible impulse," it may be desirable to comment on a matter which appeared to disturb the Court of Appeals for the District of Columbia in United States v. Durham, supra. The doctrine under scrutiny was by that court construed to mean no more than an impulse suddenly con-
113 ceived, and so to exclude a project which had been the subject of the brooding, even consideration, for some time. For example, under the notion of irresistible impulse as there interpreted, one suffering from melancholia who—after weeks of reflection[31]—commits a murder should not be held criminally insane. The narrowness of the scope of "irresistible impulse"—as thus construed—was advanced as a reason for adopting the new criteria

[31] As might be the case in infanticide, "mercy killing," or the execution of a suicide pact.

for criminal responsibility expressed in Durham. For the military establishment, however, there is no sort of requirement that the mental disease which leads to inability to adhere to the right be precipitate in origin. As a matter of fact, Technical Manual 8-240 in paragraph 5*a* cautions the examiner to beware of a claimed "irresistible impulse" unaccompanied by an appropriate history of prior mental disease. Thus, so far as military law is concerned, we find no worries concerning the existing rule of the nature of those which plagued the Court of Appeals. Cf. State v. White, 38 NM 324, 270 P. 2d 727. We may add that, in our view, the phrase "irresistible impulse" should, for safety's sake, be omitted wholly from instructions to a court-martial. Cf. Royal Commission Report, paragraph 314; Royal Commission Minutes, Q 4009.

## VI.

At the trial the Government called numerous expert witnesses to establish that Mrs. Smith was mentally responsible at the time of the stabbing. One Captain Reilly, a neurologist, testified that an electroencephalogram, plus a detailed physical examination of the accused, revealed no indication of organic disease or defect of her central or peripheral nervous system. Thereafter there appeared a Colonel Hessin, Chief of the Neuropsychiatric Service at the medical facility in which Mrs. Smith had been hospitalized prior to trial. The Colonel stated that he had treated Mrs. Smith in April and May 1952, and later had sat as president of a sanity board which sought to evaluate her mental condition after the slaying. He also testified—without objection—that the
114 board had determined unanimously that Dorothy K. Smith was legally sane when she killed her husband, and had arrived at a diagnosis of:

> " . . . '1. Emotional instability reaction, chronic, severe, manifested by extreme emotional outbursts and suicidal and homicidal manifestations. Predisposition, severe (numerous previous hospitalizations for similar disorder); stress, minimal (recent arrival in the Far East Command); incapacity, minimal. 2. Intoxication, drug, barbiturate and paraldehyde (terminated 4 October 1952). 3. Addiction, drug (barbiturate).
>
> These diagnoses were accepted by the Board.' "

According to Colonel Hessin, this diagnosis revealed only a behavior disorder and not a mental defect, disease, or derangement. He stated that only at one point did the accused's past record reflect a diagnosis of any condition which might possibly be deemed

a mental disease.[32] In the course of cross-examination the defense caused the witness to identify various medical records of Mrs. Smith, and thereafter introduced them in evidence.

After the defense had introduced evidence of insanity, the Government called in rebuttal Major Henry Segal, a psychiatrist who had seen the accused at 8:00 o'clock on the morning of October 4, 1952 only a few hours after the killing. Major Segal testified that as a member of the sanity board he had concurred in its conclusions, which—again without objection—he described as unanimous. His opinion was that the accused had been, at the time of the offense, able to distinguish right from wrong and to adhere to the right. He did not believe that she was moved by an irresistible impulse—this because he did not find that she was suffering from a mental defect, disease, or derangement. He affirmed, 115 without defense objection, that he was familiar with the language of TM 8-240, paragraph 5*a*, to the effect that irresistible impulse should not "be used to exculpate aggressive character or behavior disorders"[33]—and stated that he "concurred" in the phrasing of the Technical Manual in this particular. Major Segal also explained his reasons for discounting the possibility that Mrs. Smith suffered from a psychosis due to drug intoxication at the time of the act.

The accused's defense of insanity centered on testimony given by

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[32] "Q. In your examination of Mrs. Smith, Colonel, did you and the board find any evidence of any mental defect, disease or derangement on the part of the accused?

"A. I think at one point in the series of diagnoses made in the past medical records there was one diagnosis of anxiety reaction.

"Q. Is anxiety reaction, as such, a mental disease, defect or derangement?

"A. It could be classified under disease.

"Q. Under a mental disease?

"A. Mental disease."

[33] In the course of a question, the following was quoted to Major Segal by the trial counsel without defense objection:

> "'The adhere to the right or irresistible impulse doctrine is not intended to apply to actions committed while drunk, nor to the furies and frenzies of an ill-tempered man who is free of psychosis. Nor should it be used to exculpate aggressive character or behavior disorders. Actually the doctrine is but seldom applicable, and its application will be limited to actions committed by persons with sick minds—actions perpetrated because of those sick minds.'"

See also United States v. Trade, 2 USCMA 581, 10 CMR 79.

Brigadier General Rawley E. Chambers, United States Army Chief of the Division of Psychiatry and Neurology, under whose care Mrs. Smith had been at various times from 1948 to 1951. Chiefly on the basis of her history while his patient, General Chambers believed that Mrs. Smith—while able to distinguish right from wrong—could not adhere to the right at the time of the offense. According to this expert, had a uniformed police officer been in her presence at the time of the slaying, it would not have caused the accused to restrain herself. On cross-examination General Chambers stated that at various times he

> "... had considered her [the accused] as an anxiety neurosis but as the picture began to unfold, it is a long-standing pattern and continual struggle with these various episodes, and the final diagnosis, as I recall, was emotional instability reaction with barbituate addiction."

The General contended that Mrs. Smith suffered from a mental defect, disease or derangement. Trial counsel then directed the witness' attention to TM 8-240, paragraph 13, in which it is stated that character and behavior disorders do not constitute a
116 defense to crime—and the General conceded that some of Mrs. Smith's outbursts did constitute evidence of a character or behavior disorder.[34] At a later point in the cross-examination, General Chambers was requested by trial counsel to utilize "the terms that are contained in the Manual for Courts-Martial and also in TM 8-240, 'Psychiatry in Military Law.'" The General indicated that this was agreeable to him. Thereupon defense counsel commented that to require a medical witness "to express his thoughts in legal vocabulary" would not be "consistent with his training or with his ideas in this case." After further explanation by the trial counsel of his assigned purpose—that is, to facilitate disposition of the issue of legal responsibility—the law officer commented:

> "LAW OFFICER: The trial counsel's question calls for the witness to answer as fully as he understands the Manual and the Technical Manual. I am sure that the witness is capable of explaining any further departure that has been mentioned by defense. Objection overruled."

[34] "Q. Thank you, sir. Now, these violent outbursts, these drinking sprees, these superficial suicidal attempts, on the part of Mrs. Smith over a period of many months, in your opinion today, General Chambers, are they behavior characteristics of mental characteristics?

"A. The definition—they are by definition, character and behavior disorders."

No further comment or objection was presented by the defense in this particular.

General Chambers then testified that the accused was in his opinion suffering from a "toxic psychosis" at the time of the stabbing. The witness later conceded that, "with minor deviations," he was "in complete accord" with the diagnosis of the sanity board. Apparently the chief "deviation" lay in the fact that General Chambers believed that "acute drug intoxication" existed at the moment of the offense.

VII

The defense complains because of the fact that TM 8-240 was used in the cross-examination of General Chambers, as well as in the direct examination of prosecution witnesses. The Manual for Courts-Martial states that the "regulations and official publications" issued by the Department of Defense, or the several departments thereunder, may be noticed judicially—including "general orders, bulletins, circulars, price lists, and court-martial orders." Paragraph 147*a*. It strikes us that a Technical Manual jointly published by the Army and the Air Force clearly falls within the purview of this provision:

We detect no violation of the Code in this authorization of judicial notice. To be sure, a type of hearsay is involved. At the same time, we find nothing amiss in permitting a court-martial to enjoy the benefit of information compiled by the military establishment and carefully prepared with special reference to military problems. As to a matter of psychiatric learning, certainly no witness could be controlled by anything contained in TM 8-240—and we would hardly anticipate that a court-martial would feel itself bound in any respect. Moreover, on a controverted medical point, the defense would be perfectly free to introduce its own evidence—and as to any expression of views on points of law, this Court can, of course, review for error and for possible prejudice therefrom.

While we acknowledge that civilian courts have refused to permit the contents of text books to be brought to a court's attention, we would surmise that, to an appreciable extent, this doctrine reflects a sound recognition that under any other rule it would be difficult for a judge to distinguish between those treatises which are to be received in evidence, or noticed by a court, and those which are not. For military law there is no such problem of "drawing the line," since the distinction is ready-made as between, on the one hand, "official" publications stemming from units and commands under the Department of Defense, and, on the other, unofficial documents. In reality the problem is little different from that found in United States v. White, 3 USCMA 666, 14 CMR 84, where we upheld the admissibility of a certificate of fingerprint identification, prepared in accordance with the Manual for Courts-Martial, paragraph

143*a*. That Manual provision dispensed with the need to
118 call an expert witness for the purpose of testifying to the results of fingerprint comparison. As was emphasized at the time, this practice in no way operated to deprive the defense of the right to contravene the evidence of identification contained in the permitted certificate. To notice judicially the contents of TM 8-240 would certainly serve to place before the court the conclusions on certain general psychiatric matters of those experts in the Office of the Surgeon General who had assisted in the preparation of the Technical Manual. But the accused—just as in White—could contest the assertions of these experts, and the court-martial could then elect between conflicting views. The standards of competence and accuracy reflected in the technical publications of the Armed Services are sufficiently high to cause us to doubt that an accused will suffer from having their contents noted by the members of a court-martial. This presumably was also the view of the draftsmen of the Manual for Courts-Martial.

Since we conclude that the Technical Manual might properly have been noticed judicially by the court-martial, we do not doubt that it could with equal propriety be utilized for cross-examination purposes. This seems particularly evident when—as here—the portions read to the court during the course of the direct and cross-examinations enunciated an entirely correct interpretation of the law applicable to the case at bar.[35] The doubt voiced on one occasion by the defense counsel concerning the use of TM 8-240 scarcely involved an "objection" in any proper sense of the term, and, in light of the entire record, does not present an issue on appeal.
119 Cf. United States v. Johnson, 318 US 189. At that time, to, the law officer made it clear that the witness was not to be limited by the phraseology of the Technical Manual in the presenta-

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[35] The portions of the Technical Manual utilized in the cross-examination of General Chambers and during the direct examination of Major Segal were those dealing with the distinction between mental defect, disease, or derangement, on the one hand, and character or behavior disorders, on the other. On these matters TM 8-240 sets forth a correct interpretation of the military rules dealing with insanity prescribed in the Manual for Courts-Martial—when read within the context of the Joint Definitions of the Armed Forces promulgated in SR 40-1025-2. The "policeman" test only entered the picture prior to instructions and via the testimony of General Chambers on direct examination to the effect that the accused could not have adhered to the right although a policeman had been at her elbow.

tion of his medical testimony.[36] The defense, however, made
120 no effort later in the trial to have General Chambers elaborate any matters as to which he considered the Technical Manual to have hindered his testimony.

The law officer instructed the court-martial—undoubtedly on the basis of TM 8-240—to the effect that "If the accused would not have committed the act had there been a military or civilian policeman present she can not be said to have acted under an irresistible impulse." As previously suggested, it is undeniable that such a test may—in some instances and under certain constructions—be misleading. However, this abstract possibility of ambiguity signifies nothing more in the case before us than that a proper defense instruction for clarification of the "policeman" test should, if requested, have been granted. There is absolutely nothing in the record of trial to suggest that a distinction was drawn by anyone between a situation involving a high probability of apprehension,

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[36] In its entirety the incident was as follows:

"Questions by prosecution:

"Q. General Chambers, continuing the cross examination, I would like first this morning to ask you, please, to use the terms, if you will, in describing the conditions and emotions of this accused, the terms that are contained in the Manual for Courts-Martial and also in TM 8-240, 'Psychiatry in Military Law.' I make that request for the purpose of keeping as much confusion as possible out of the record. Is that agreeable?

"A. Yes, sir.

"DEFENSE (Brigadier General Richmond): May I make this comment, that the pamphlet which counsel had in his hand is a pamphlet entitled, 'Psychiatry and the Law.' We have known military law. We have two distinct vocabularies, one legal, one medical. What this pamphlet is trying to do is superimpose the medical vocabulary upon the legal vocabulary and the two particulars do not exactly fit. The words used by the legal have one connotation, and the words used by the medical have another connotation. The difficulty is harminizing those two means so that we might understand. Now, to request a medical officer to confine his language to legal vocabulary is extremely difficult, the same as it would be for a lawyer to express his thoughts in medical terms, and it is that position that I wish to bring to the court's attention. Counsel is requesting a medical witness to express his thoughts in legal vocabulary, which I do not think is consistent with his training or with his ideas in this case.

"PROSECUTION: I wish to comment for the record that it is familiar to all of us that the problem which faces this court is

detection, and punishment, on the one hand, and that which would have existed had a policeman been physically present, on the other. The latter hypothesis—it seems perfectly clear—was only taken as illustrative of the former.

Moreover, the real issue at the trial was simply one of whether Mrs. Smith suffered from a "mental defect, disease, or derangement," within the meaning of the Manual for Courts-Martial. General Chambers testified in her behalf, and to the effect that she was suffering from a mental disease—namely a toxic psychosis—at the time of the homicide, and that her conduct would have
121 been no different had a policeman been present. The cross-examination of this witness centered on the existence of "mental disease," within the 1951 Manual's meaning. The Government's witnesses rested their conclusion of sanity on the premise

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the legal responsibility and accountability of this accused. My only purpose in asking the witness, if possible, to limit himself to these terms with which, as Chief of Psychiatry of the United States Army, I am sure he is thoroughly familiar, and I believe is a a [sic] reasonable request.

"LAW OFFICER: The trial counsel's question calls for the witness to answer as fully as he understands the Manual and the Technical Manual. I am sure that the witness is capable of explaining any further departure that has been mentioned by defense. Objection overruled."

To put the matter in perspective more fully, it should be observed that the trial counsel was seeking to elicit from General Chambers a distinction between mental defect, disease, or derangement, on the one hand, and character and behavior disorders, on the other. This witness, as noted in the text, had diagnosed Mrs. Smith as suffering *from* "emotional instability reaction," although he had at one time inclined an "anxiety neurosis" diagnosis. The sanity board also diagnosed the accused as suffering from "emotional instability reaction." The Joint Definitions of the Armed Forces place this psychiatric state under the head of character and behavior disorders, and apparently equate it to one type of psychopathy, which is generally considered ot constitute a character and behavior disorder. See SR 40-1025-2, paragraph 6*b*(1). Under these circumstances trial counsel was thoroughly justified in inquiring of General Chambers, the Army Chief of Psychiatry, how he reached the conclusion stated during his direct examination—at page 299 of the record—that Mrs. Smith was not so free from mental defect, disease, or derangement as to have "any ability to adhere to the right at that time," that is, at the time of the offense charged. The law officer did not unduly box the defense, yet he permitted trial counsel to go into this matter. Therefore, his ruling was correct.

that no mental defect, disease, or derangement existed. They found no toxic psychosis. Their primary diagnosis of "emotional instability reaction" is one which manifestly classified as a character or behavior disorder, within the meaning (1) of the Manual for Courts-Martial, (2) of TM 8-240, and (3) of the Joint Armed Forces Definitions. The last-mentioned publication points out specifically that this diagnosis "is synonymous with the former term 'psychopathic personality' with emotional instability."

Indeed, as the case reached the members of the court-martial, it is almost inconceivable that they could have accepted General Chambers' assertion that the accused suffered from a mental disease, within the legal meaning of the term, and yet have concluded that she was able to adhere to the right. Even more improbable is the prospect that the court drew any sort of distinction with respect to the physical presence of a policeman—or viewed the "policeman" test as other than one which graphically embodied the test of whether the accused would have been deterred by the prospect of punishment. After examining the issues as they were framed at the trial, together with the remainder of the instructions, we are sure that the use of the "policeman" test could not have harmed the accused in any manner.

## VIII

The defense claims that reversible error inhered in the denial of a requested instruction:

> "The members of the court are instructed that if they believe from the evidence that at the time of committing the act charged in the specification the accused was suffering from such a perverted and deranged condition of her mental faculties as rendered her incapable of distinguishing between right and wrong, or unconscious at such time of the nature of the act charged in the specification while committing the same, or where, though conscious of such act and able to distinguish between right and wrong, and to know that the act was wrong,
> 122 yet her will, the governing power of her mind, was so completely destroyed that her action was not subject to it but was beyond her control, then you must find the accused not guilty of the specification and the charge."

The denial of such an instruction was—they point out—the basis for reversal in Smith v. United States, 36 F. 2d 548 (CA DC Cir). However, in that case the instructions given by the judge completely ignored the possibility of "irresistible impulse"—as to which there was at the time evidence before the jury. *This* was the reason for reversal.

Here, on the other hand, the law officer had informed the court explicitly that an inability to adhere to the right, as well as an

incapacity to distinguish right from wrong would compel acquittal. While we have conceded that the phrasing used in the presentation of the "policeman" test contained possible ambiguity, we do not at all interpret the requested charge as designed in any measure to clarify *that* ambiguity. Cf. United States v. Boykins, 3 USCMA 806, 14 CMR 224. Further, the phrase in the requested instruction having to do with being "unconscious at any time of the *nature of the act*," charged in the specification, might have appeared to the members of the court-martial to introduce a third test of mental responsibility—that is, one in addition to (1) ability to distinguish right from wrong as to the particular acts charged and (2) ability to adhere to the right concerning those acts. (Emphasis supplied.) Of course, reference is here made to a possible requirement of knowledge of the "nature and quality" of the act performed by the accused.

The McNaughten Rules, as originally stated and as applied in many jurisdictions, would suggest the existence of this third criterion. However, the Manual does not authorize it—with the result that it furnishes no basis for a requested instruction. When an attempt is made to extract a kernel of meaning from the phrase "nature and quality" of the act, the effort is reduced to the following questions: whether (1) the accused knew what he was doing, (2) knew that it was wrong, and (3) knew that it was punishable. Several hypothetical problems may point up possible differences between this standard and those found in military law.

123 For instance, let us suppose that an accused, by reason of mental disease, believed himself to be caressing another when in reality he was strangling the latter to death. Rather clearly he would not have been aware of the nature of this act in one sense of the term—and by some interpretations might therefore qualify for acquittal under the McNaughten Rules. Whether he would similarly qualify under the military rule would depend, of course, on whether he recognized as being wrong the act he believed himself to be performing. Thus in the example suggested, if he believed the caress to be wrong, he would be responsible. His responsibility would, however, be no more than partial, since necessarily he would not have been able to premeditate—and thus would not be subject to conviction from premeditated murder.

If the accused had failed to know that the act he was performing was punishable, then he could not have been deterred by fear of punishment. Therefore, under military law, he could not have adhered to the right—and was mentally irresponsible. Thus, the result would be as liberal as any possible under an interpretation of the McNaughten phrase having to do with knowledge of the "nature and quality" of an act. However, what if the accused

knew that he would be punished for the act, knew that it was wrong according to law, yet considered his conduct to be right morally? It might be argued in such an instance that he was wanting in knowledge of the "nature and quality" of his act—and thus was irresponsible. However, as the rules of mental responsibility are set down in the Manual for Courts-Martial, we do not believe that the contrast between "right" and "wrong" was meant to extend beyond that which is recognized as right or wrong by law. An accused's notion that an act is morally right, although he realizes its legal wrongfulness, does not constitute a defense. Here, then, a difference may exist between the approach of military law and that applied in certain civilian courts. In practice, however, we suspect that the ultimate results will frequently be identical under both systems. For example,
124 the prospect of punishment may often fail to deter one who feels impelled to transgress the law because of some high moral purpose—so that inability to adhere to the right will be present. Similarly an individual afflicted with severe delusions of persecution will but rarely be deterred by punitive prospects from attacking his supposed tormentors. Moreover, we are genuinely inclined to doubt the frequent existence of psychiatric ills by reason of which the individual affected recognizes an act to be legally wrong, but deems it justified by some lofty ethical purpose.

The fundamental point here is that in courts-martial a reference to knowledge of the "nature" or the "consequences" of acts can only be confusing. We are sure that the law officer is not obliged to introduce this complication into the trial—even following a defense request. When we consider the generality and involution of the instruction requested, we cannot see that it would have clarified the extensive instructions otherwise supplied at the trial, or would have added aught in the nature of enlightenment. Nor are we able to perceive any phase of the subject, not otherwise the subject of adequate instructions, concerning which the law officer was put on notice by the defense request. Accordingly, we are sure that he was well within his rights in denying the additional charge requested by the defense. United States v. Boykins, supra.

## IX

The defense is certain that error was committed when trial counsel, over objection, was permitted to read, during his closing argument, an extensive extract from the testimony of General Chambers. There is no issue concerning the accuracy of the transcript read. Accordingly, no error was committed—for the law officer possessed discretion to permit such a reading of testimony. United States v. Chiarella, 184 F 2d 903 (CA 2d Cir.

In the case before us General Chambers was the mainstay of the defense. The prosecution appears to have considered that its cross-examination had destroyed completely the value
125 of his testimony. We cannot possibly find cause for complaint on the part of the defense arising from the fact that trial counsel wished the members of the court to deliberate with the testimony of the defense's star witness fresh in their ears. Especially is this true since the law officer informed the defense that if, in the reading of the transcript, "the prosecution brings out here new matter that is inappropriate to a closing argument, you may be heard on that later on." However, no further action was taken by the lawyers for the accused.

## X

Error is also claimed because the trial counsel, in his examination of Government witnesses, brought out that the report of the sanity board had been unanimous—and later adverted to that circumstance in argument. The short answer to this proposal is that the defense wholly failed to object—either to the testimony now in question or to the reference to the matter in argument. However, a like contention is made with respect to a petition for new trial, which in part relies on what is appraised as a conscious suppression of evidence by the prosecution. The predicate for this latter petition is an affidavit of Captain William E. Mayer, a psychiatrist and a member of the sanity board—but one not used by trial counsel as a witness. The defense maintains that he was not called because the Government well knew that he did not agree with the conclusions of the board. Accordingly, they insist that the frequent references at the trial to the "unanimous" conclusions of the body were peculiarly noxious.

Captain Mayer now says that he signed the report because he believed that the conclusions set down therein "met the requirements contained in TM 8-240, 'Psychiatry in Military Law.'" He adds that if the same questions relating to Mrs. Smith's mental responsibility ha. been propounded to him "in civilian practice, where I was not subject to the limitations imposed by the cited technical manual, I would not have concurred fully in the conclusions reached by the Board, particularly in regard to Mrs. Smith's ability to adhere to the right." According to him "from a *purely medical* point of view," Mrs. Smith was suffering
126 from a "mental defect, disease, or derangement." (Emphasis supplied.) And from the same point of view her ability to adhere to the right was "*impaired*." (Emphasis supplied.) Captain Mayer deposes that he concurred in the conclusions reached by the board because "I believed it quite possible that the presence of a policeman, or of any other person, might, *to a*

*certain extent*, have acted as a deterrent to Mrs. Smith's actions on the night in question. I believe that Mrs. Smith would have *struck* her husband even if a policeman had been present. I do not believe that she would have consciously *stabbed* him to death under those circumstances." (Emphasis supplied.)

As we analyze this affidavit, Captain Mayer simply indicates that he dislikes the standards of military law with respect to mental responsibility.[37] Further, Captain Mayer was careful to say that he was speaking "from a purely medical point of view." Perhaps this signifies recognition on his part that law and penology must sometimes move beyond considerations which might be involved in the treatment of a single patient. In any event, military and other law must transcend the "purely medical" within this sphere. Captain Mayer speaks consistently of "impaired" ability to adhere to the right. It is distinctly unclear whether he has at any time deemed Mrs. Smith to have been "*completely* deprived" of her ability to adhere to the right when she killed her husband. See Manual for Courts-Martial, supra, paragraph 120*b*. (Emphasis supplied.) His comments on the "policeman" test in the present context signify little more than that he may have been too literal in his understanding and application thereof. In result, Captain Mayer's distinction between striking and stabbing her husband had a policeman been present suggests in fact that as to the murder charged, Mrs. Smith did *not* lack mental responsibility. Moreover, the Captain has never repudiated
127 the diagnosis of Mrs. Smith as a sufferer from "emotional instability reaction." We have earlier emphasized that, prima facie at least, this diagnosis reveals only a character and behavior disorder, rather than a mental disease producing irresponsibility.

In any event, and although trial counsel had conversed with Captain Mayer prior to the trial, no slightest showing of a conscious suppression of evidence is made. The affidavit of defense counsel in support of the petition for new trial indicates clearly that the members of the sanity board were available to him for consultation. In fact, one of the members of the defense staff was present at the time certain of the board's members signed their report.[38] He argues that trial counsel should have informed him that Captain Mayer had reservations relating to the report he had signed.

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[37] Captain Mayer might be still more dissatisfied with the standards of those civilian jurisdictions—far and away the majority—which do not recognize "irresistible impulse" as a defense.

[38] The accused was defended by two competent and experienced lawyers, one of them a distinguished retired brigadier general who had held high posts as a judge advocate officer.

In our convinced opinion, those reservations—as voiced in the latter's carefully phrased affidavit—are in no way so clear as to create any sort of duty on the part of trial counsel to make disclosure of his opposite number.[39] Since Captain Mayer—and every other member of the sanity board—had signed the report indicating that Dorothy K. Smith was sane, we find no prejudicial misrepresentation involved in the trial counsel's adducing testimony to the effect that the report had been unanimous, and thereafter in commenting on that circumstance in argument. By interposing an objection on hearsay grounds to testimony that the report of the sanity board was unanimous, the defense could have compelled the Government to call Captain Mayer—if the
128 prosecution's personnel wished to place the circumstance of unanimity before the court-martial. Not having utilized this ground for valid objection, the defense has no just cause for complaint.[40]

## XI.

The court was specifically instructed by the law officer that: "If, in the light of all the evidence, the court has a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill which is involvd in the offense of premeditated murder, the court must find her not guilty of that offense." This instruction adequately informed the court of the possibility of partial responsibility—and a consequent finding of unpremeditated murder.[41] Thus, no error inheres in the *finding* of premeditated murder. Cf. United States v. Kunak, supra.

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[39] The trial counsel and assistant trial counsel explain in affidavits that they did not call Captain Mayer because they considered his testimony cumulative, and not because of a desire to suppress evidence. Perhaps, too, they did believe that he would not be so forceful or convincing a witness as Colonel Hessin or Major Segal. Yet, even so, there was no error, nor want of ethics, in failing to call this witness—who was equally available to the defense.

[40] Defense counsel may have chosen to refrain from objecting to the references to the "unanimous" report of the sanity board because they anticipated that the prosecution would then call *all* members of the board as witnesses.

[41] Military law and that declared by the Court of Appeals for the District of Columbia are completely out of phase. That Court has adopted a distinctly liberal approach to total mental irresponsibility, but has reaffirmed its refusal to accept the doctrine of partial responsibility. See Stewart v. United States, 214 F. 2d 879; Fisher v. United States, 149 F. 2d 28, aff'd 328 US 463. We, on the other hand, recognize that mental capacity can be wanting to a degree which will not exculpate entirely, but which will lessen the

degree of the offense. See United States v. Kunak, supra.

However, subsequent to the trial a civilian psychiatrist, a civilian clinical psychologist, and three military psychiatrists had occasion to observe Mrs. Smith following her transfer to the United States as a prisoner. Any conflict in their views concerning the accused's sanity at the time of the offense has been resolved against her by the board of review—and we find no reason to disturb the conclusion of its members on this point.[42] The experts who ex-
129 amined Mrs. Smith after the court-martial hearing were doubtful of her ability to "premeditate" at the time of the defense. The board of review weighed this new evidence, but nevertheless concluded that premeditation had existed. Since this Court lacks the power to determine the weight of the evidence, even as to the issue of sanity, we are without authority to disturb the board's determination—regardless of whether we might have reached an opposite conclusion.

XII

Accordingly the decision of the board of review must be affirmed.

Judge LATIMER concurs.

QUINN, Chief Judge (dissenting):

I dissent.

Apart from regarding the elaborate discussion on mental responsibility and the opinion of the United States Court of Appeals for the District of Columbia in United States v. Durham, 214 F. 2d 862 (1954), as unnecessary to the decision of this case (See United States v. Kunak, 5 USCMA— —, 17 CMR——), I strongly disa-

[42] As matters now stand the views expressed with respect to Mrs. Smith's sanity cover the entire spectrum. The Army sanity board set up prior to the court-martial hearing, and another convened subsequent to trial, considered that at the time of the offense the accused was so far free from mental defect, disease, or derangement as to be able to distinguish right from wrong with respect to the act charged, and to adhere to the right. General Chambers, Army Chief of Psychiatry, thought that she could distinguish right from wrong, but that she could not, at the time of the offense adhere to the right by reason of a toxic condition. Certain civilian consultants later determined on an inability both to distinguish right from wrong, and to adhere to the right. Thus, it must be conceded that although military law seems more closely linked than other systems with specific psychiatric diagnoses, the area of disagreement among mental experts is still depressingly immense. When they become less so, it is time to consider an adoption of the Durham rule.

gree with substantial parts of it. However, I need not recite all the particulars of my disagreement because I find here, as I did in United States v. Kunak, supra, an improper use of the technical manual, TM 8-240, "Psychiatry in Military Law."

Mention of the technical manual first occurs in the cross-examination of Brigadier General R. E. Chambers, Chief of the Division of Psychiatry and Neurology, Office of the Surgeon General, United States Army. General Chambers testified for the defense.

At various times in a period of years preceding the offense,
130 he had the accused under his medical care. He also examined the medical data respecting the accused that had been obtained shortly before and after the crime. In his opinion, the accused could not adhere to the right at the time of the commission of the offense. Attempting to undermine this opinion, the prosecution sought to limit General Chambers to a statement of his medical opinion, in terms of the definitions of mental disorders enumerated in the technical manual. Later, a prosecution rebuttal witness, Major H. A. Segal, one of the members of a medical board of officers which examined the accused before the trial was similarly circumscribed in his testimony. This appears very clearly in the following excerpt from his direct testimony:

> "Q. In your opinion, does the accused now suffer or did she suffer on the night of 3-4 October with any mental defect, disease, or derangement as defined by TM 8-240?
>
> "A. Under the definition of TM 8-240, it is my opinion that she did not and does not suffer from any mental disease, defect, or derangement."

It also appears that Captain W. E. Mayer, a member of the same medical examining board as Major Segal, signed the medical report, which was frequently referred to at the trial, because he believed that:

> " . . . the conclusions therein set forth met the requirements contained in TM 8-240, 'Psychiatry in Military Law.' If the same questions relating to Mrs. Smith's mental responsibility had been propounded to me in civilian practice, where I was not subject to the limitations imposed by the cited technical manual, I would not have concurred fully in the conclusions reached by the Board, particularly in regard to Mrs. Smith's ability to adhere to the right.
>
> "4. I am of the opinion and believe that, from a purely medical point of view, at the time of the alleged offense Mrs. Smith was suffering from a 'mental defect, disease, or derangement.' I am of the opinion and believe that at the time of the alleged offense Mrs. Smith was incapable of setting out to kill her husband in a calculated, premeditated way. I am of the

opinion and believe that, from a purely medical point of view, at the time of the alleged offense Mrs. Smith's ability to adhere to the right was impaired."

131 This showing is supplemented by a statement in the report of the second board of medical officers, which was submitted to the board of review in connection with its reconsideration of the case. The statement reads as follows:

"Records of examinations conducted by two expert consultants to the Surgeon General, one in Psychiatry and one in Clinical Psychology, are attached to this report as an exhibit. Both are on the visiting staff for the Neuropsychiatric Service, Letterman Army Hospital. It is believed that it is pertinent to note here that Dr. Alexander Simon is a nationally known psychiatrist and at present is Professor of Psychiatry, University of California Medical School, San Francisco, California. Dr. Douglas M. Kelley is widely known in Psychiatry, considered an authority on the Rorschach psychological procedures and has had considerable experience in the medico-legal field. At present, Dr. Kelley is Professor of Criminology at the University of California, Berkeley, California.[1]

"The medical officers who have examined Mrs. Smith and whose names will be signed to these findings, function in a somewhat differently structured medico-legal context than their civilian colleagues who have also examined the accused. By this, it is inferred that the military psychiatrists latitude is in effect, somewhat diminished as to what findings he may make by the established body of medico-legal policy and precedent now codified in part in TM 8-240. It is the impression of the undersigned that in a civilian jurisdiction a much more liberal interpretation of issues of mental responsibility in crimes of violence is frequently observed. These statements are made in an attempt to explain some of the differences of opinion as to the accused's responsibility expressed by military and civilian psychiatrists."

From the record, it is distinctly evident that the prosecution's expert witnesses did not testify according to convictions based upon their own knowledge and medical experience, but in accordance with strictures of the technical manual. It matters not that the manual may have been intended for instructional purposes only. Clearly, the medical experts considered themselves bound

[1] These consultants concluded that the accused, at the time of the offense, was not able to distinguish right from wrong or to adhere to the right.

by the manual's terms, to the exclusion of their individual professional beliefs. Under the circumstances, their testimony was so seriously compromised as to require, in the interest of justice, a rehearing. See my dissenting opinion in United States v. Kunak, supra.

132 Supreme Court of the United States

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 12, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is transferred to the summary calendar and assigned for argument with No. 701.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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